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First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur

Topic:

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(Agenda item 4)

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First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur

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CONTENTS

	Paragraphs	Page
I. INTRODUCTION	1-9	3
A. Basis of the present report	1-7	3
B. Arrangement of the present report	8-9	4
II. OBSERVATIONS ON THE DRAFT ARTICLES AS A WHOLE	10-92	4
A. Importance of and need for the codification of the topic	11-15	4
B. Sources of the draft articles	16-18	6
C. The concept of " succession of States "	19-20	6
D. Relationship between succession in respect of treaties and the general law of treaties	21-23	6
E. The principle of self-determination and the law relating to succession in respect of treaties	24-30	7
F. Form of the draft	31-41	10
G. Scope of the draft	42-48	11
H. Scheme of the draft	49-65	13
1. Categories of succession of States	50-57	14
2. Categories of treaties	58-61	16
3. Arrangement of the draft articles	62-65	17
I. Recognition and succession of States	66-80	17
J. Interrelation between the present draft articles and the draft articles on succession of States in respect of matters other than treaties	81-87	20
K. General approval or disapproval	88-92	22
III. OBSERVATIONS ON THE SPECIFIC PROVISIONS OF THE DRAFT ARTICLES	93-471	23
Preliminary observations of the Special Rapporteur	93-94	23
Part I. General provisions	95-196	23
Article 1. Scope of the present articles	95-98	23
Article 2. Use of terms	99-135	24
Paragraph 1 (*a*)	99-158	24
Paragraph 1 (*b*)	102-119	24
Paragraph 1 (*c*)	120	28
Paragraph 1 (*d*)	121-123	28
Paragraph 1 (*e*)	124-135	28
Paragraph 1 (*f*)	136-143	30
Paragraph 1 (*g*)	144-146	31
Paragraph 1 (*h*)	147	32
Paragraph 1 (*i*)	148-150	32
Paragraph 1 (*j*)	151	32
Paragraph 1 (*k*)	152	32
Paragraph 1 (*l*)	153	32

* Incorporating A/CN.4/278/Add.5/Corr.1.

	Paragraphs	*Page*
Paragraph 1 (*m*)	154	32
Paragraph 1 (*n*)	155-157	32
Paragraph 2	158	32
Article 3. Cases not within the scope of the present articles	159-162	32
Article 4. Treaties constituting international organizations and treaties adopted within an international organization	163-165	33
Article 5. Obligations imposed by international law independently of a treaty	166-169	33
Article 6. Cases of succession of States covered by the present articles	170-179	33
Article 7. Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State	180-186	35
Article 8. Successor State's unilateral declaration regarding its predecessor State's treaties	187-190	36
Article 9. Treaties providing for the participation of a successor State	191-196	36
Part II. Transfer of territory	197-213	37
Article 10. Transfer of territory	197-213	37
Part III. Newly independent States	214-363	39
Section 1. General rule	214-319	39
Article 11. Position in respect of the predecessor State's treaties	214-217	39
Section 2. Multilateral treaties	218-256	40
Article 12. Participation in treaties in force	218-256	40
Article 13. Participation in treaties not yet in force	257-263	48
Article 14. Ratification, acceptance, or approval of a treaty signed by the predecessor State	264-274	49
Article 15. Reservations	275-298	50
Article 16. Consent to be bound by part of a treaty and choice between differing provisions	299-306	55
Article 17. Notification of succession	307-308	56
Article 18. Effects of a notification of succession	309-319	56
Section 3. Bilateral treaties	320-333	58
Article 19. Conditions under which a treaty is considered as being in force	320-326	58
Article 20. The position as between the predecessor and the successor State	327-328	59
Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party	329-333	59
Section 4. Provisional application	334-352	59
Article 22. Multilateral treaties	334-342	59
Article 23. Bilateral treaties	343-346	61
Article 24. Termination of provisional application	347-352	61
Section 5. States formed from two or more territories	353-363	62
Article 25. Newly independent States formed from two or more territories	353-363	62
Part IV. Uniting, dissolution and separation of States	364-416	64
Article 26. Uniting of States	364-389	64
Article 27. Dissolution of a State	390-405	68
Article 28. Separation of part of a State	406-416	71
Part V. Boundary régimes or other territorial régimes established by a treaty	417-462	73
Article 29. Boundary régimes and Article 30. Other territorial régimes	417-462	73
Part VI. Miscellaneous provisions	463-471	87
Article 31. Cases of military occupation, State responsibility and outbreak of hostilities	463-471	87

I. Introduction

A. Basis of the present report

1. By resolution 3071 (XXVIII) adopted on 30 November 1973, the General Assembly welcomed the decision of the International Law Commission to give priority at its twenty-sixth session to succession of States with respect to treaties and to State responsibility. The same resolution recommended that the International Law Commission should complete at its twenty-sixth session, in the light of comments received from Member States, the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session.[1] Accordingly, the basis of the present report will be the draft articles as set out in that report of the International Law Commission. As recommended by the resolution, the draft articles will be re-examined in the light of comments received from Member States whether in writing or through the debates in the Sixth Committee and in the General Assembly itself. Though all due weight will be given to those comments, account will also be taken of any other considerations that appear to be relevant including, as appropriate, the views of any non-member State.

2. In general, the purpose of the Special Rapporteur will be to help the Commission towards the fulfilment of its task on the basis of the draft articles. It would not be compatible with the task in hand to introduce extensive innovations or new departures of doctrine. Such a course would impede the progress of the Commission and might even prevent it from completing the draft articles at its twenty-sixth session, Moreover, it is clear that the draft articles have, broadly speaking, been received with approval in the General Assembly and that any radical departure from their general tenor would be likely to create serious obstacles to their ultimate acceptance by the international community as a whole.

3. Nevertheless, due account will be taken of all the comments made by or on behalf of Governments even though it may not be feasible to mention specifically each comment that has been made. On the other hand, it will not be possible to accede to every suggestion or bend to every criticism. Due account will have to be taken of considerations of law and practice and compatibility with the nature and characteristics of the draft as a whole, and of views previously expressed in the Commission itself.

4. Much help and guidance has been derived from the reports of Sir Humphrey Waldock, as Special Rapporteur on both succession of States in respect of treaties and the law of treaties, especially his fourth report on the law of treaties.[2] The form and method of presentation used by him will be followed as far as possible.

5. It is unnecessary to summarize the history of the draft articles prior to the report of the Commission on its twenty-fourth session.[3] It is sufficient to refer to the summary of the Commission's proceedings and the documentation mentioned in paragraphs 14 to 24 of that report. Chapter II of the report, which contains, *inter alia*, the draft articles and the Commission's commentaries on them, was discussed during the debate in the Sixth Committee on the report of the International Law Commission at the twenty-seventh session of the General Assembly in 1972 (agenda item 85). The Sixth Committee considered this item at its 1316th to 1329th and 1336th to 1339th meetings, held from 28 September to 11 October and from 18 to 20 October 1972. The summary records of those meetings contain the greater part of the comments made by delegations on the draft articles. The comments are summarized in the report of the Sixth Committee.[4] That report was considered at the 2091st plenary meeting of the General Assembly which, upon the recommendation of the Sixth Committee, adopted resolution 2926 (XXVII) of 28 November 1972 on the report of the International Law Commission. By the resolution, the General Assembly welcomed the draft articles prepared by the International Law Commission on succession of States in respect of treaties and recommended that the Commission should proceed with further consideration of that topic in the light of comments received from Member States on the present draft. It should be noted that relevant comments were made, by way of explanation of vote on the resolution, by the delegations of Somalia, Ethiopia and Kenya.

6. At its twenty-fifth session in 1973, the Commission did not consider the draft articles on succession of States in respect of treaties, but, in its report on the work of that session, the Commission expressed the intention to complete at the next session the second reading of the whole of the draft articles on this topic.[5] The report of the Commission (agenda item 89) was considered by the Sixth Committee at its 1396th to 1407th and 1414th to 1416th meetings, held from 25 September to 4 October and from 11 to 16 October 1973. Although the draft articles as such were not before the Committee, a number of comments were made by delegations. These are summarized in the report of the Sixth Committee.[6] That report was presented to the General Assembly at its 2186th plenary meeting on 30 November 1973 and the Assembly thereupon adopted resolution 3071 (XXVIII) to which reference has already been made.[7]

7. By 1 March 1974 written comments had been received from the Governments of the following 10 Member States: Austria, Czechoslovakia, Denmark, German Democratic Republic, Poland, Somalia, Sweden, Syrian Arab Republic, United Kingdom of Great Britain and

[1] For all references to the draft articles and commentaries, see *Yearbook ... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II,C.

[2] *Yearbook ... 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

[3] *Yearbook ... 1972*, vol. II, p. 219, document A/8710/Rev.1.

[4] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, sect. III, B.

[5] *Yearbook ... 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 178.

[6] *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, sect. III, G,1.

[7] See para. 1 above.

Northern Ireland, United States of America.[8] Comments had also been received in a letter dated 30 April 1973 addressed to the Secretary-General of the United Nations by the Prime Minister and Minister of Foreign Affairs of Tonga, at that time a non-member State. At the request of the Chairman of the Commission, the letter was circulated to members of the Commission during its twenty-fifth session.[9]

B. Arrangement of the present report

8. Following the introduction contained in section I, the remainder of the present report consists of:

Section II: Observations on the draft articles as a whole;

Section III: Observations on the specific provisions of the draft articles;

Section IV: The problem of procedures for the settlement of disputes concerning interpretation and application of a convention based on the draft articles.[10]

To ensure continuity and ease of reference, the subheadings in section II are based on those used for the corresponding passages in the 1972 report of the Sixth Committee.[11]

9. In section II, maximum use is made of the summaries in that report and in the 1973 report of the Sixth Committee [12] of the comments made by delegations at the twenty-seventh and twenty-eighth sessions of the General Assembly. The written comments submitted by each Government will be recorded individually. In section III so far as feasible, comments will be attributed specifically to the States on whose behalf they were made whether orally or in writing. In some instances, however, it may be difficult to reflect accurately the views expressed by delegations because of the natural consequences of oral expression and the condensation of speeches in summary records. The Special Rapporteur has done his best to extract the views of delegations from the summary records of the Sixth Committee, but wishes to apologize in advance for any errors or omissions that he may have made in that regard.

II. Observations on the draft articles as a whole

10. From the statements made at the twenty-seventh and twenty-eighth sessions of the General Assembly, it is plain that the provisional draft articles contained in the report of the International Law Commission on the work of its twenty-fourth session are regarded as a sound basis for the further work of the Commission and the production of a set of draft articles which are likely to prove generally acceptable. There has been much praise for the high quality of the work already done and for the excellence of the commentaries. But, in the opinion of the Special Rapporteur, this does not mean that there is no room for improvement in the light of the comments made by delegations and by Governments. Bearing in mind the general approbation of the provisional draft articles, it is now the function of the Special Rapporteur to set out those comments systematically and to submit his own observations and proposals.

A. Importance of and need for the codification of the topic

Comments of Governments

Oral comments

11. According to the 1972 report of the Sixth Committee,[13] several delegations to the twenty-seventh session of the General Assembly stated that the greatest merit of the provisional draft articles was that they took account of the principles of international law enshrined in the Charter, particularly of the principle of self-determination and the principle of the sovereign equality of States, as well as of the realities of contemporary international life. It was said that the draft was the more remarkable because the task of codification was particularly difficult in the field where there was no general doctrine, and State practice and custom had not yet produced well established and consistent precedents. Gaps and conflicting views had obliged the Commission to make certain innovations and to creative work with a view to finding appropriate and balanced solutions to the problems involved. The draft articles prepared by the Commission, which contained elements of codification as well as of progressive development, were intended "to lay down practicable and detailed provisions which would introduce uniformity and clearness in the sparse present rules, develop them and fill the existing lacunae, taking into consideration the interests of the States as well as those of the international Community".[14] This generally favourable approach did not, however, mean that the draft articles were free from criticism.

Some delegations considered that the codification of the topic of succession in respect of treaties was an urgent task, because certain additions were still needed to the codification of the law of treaties embodied in the 1969 Vienna Convention on the Law of Treaties [15] and mentioned that the draft articles constituted a link between the law of treaties and the law of the succession of States. Several representatives underlined the special

[8] For the text of the written comments received from Governments of Member States, see below, pp. 313-330, document A/9610/Rev.1, annex I.

[9] Document ILC (XXV)/Misc.2.

[10] The Special Rapporteur did not find it feasible or expedient to complete this section of the report, but, if required, will submit a separate report on the settlement of disputes in connexion with the proposed convention.

[11] See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, sect. III,B,1.

[12] See foot-note 6 above.

[13] See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 24-33.

[14] *Ibid.*, para. 26.

[15] For all references to the Vienna Convention on the Law of Treaties (referred to hereafter as " the Vienna Convention "), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

importance of the draft articles for the newly independent States. They considered that the Commission had rightly concentrated on the newly independent States and proceeded with appropriate reference to the views of States which had achieved independence since the Second World War. They recalled that the process of decolonization was far from complete. But they acknowledged that the draft articles also contained important provisions concerning the uniting, dissolution and separation of States. Other delegations considered that the draft articles paid too much attention to the problem of newly independent States, at a time when the era of decolonization was drawing to a close, at the expense of succession problems of the future. In their view, the provisions of the draft relating to the uniting, dissolution and separation of States should be developed in the light of the practical needs of the future and due consideration given to new forms of association of States such as economic integration units or fiscal unions. Some delegations said that, as only few dependent territories remained, the topic had to a great extent lost its practical importance.

Written comments

12. *Austria.* As divergent views on the present topic have in the past been expounded by eminent scholars of international law, the Government of Austria considers that it is an important task to arrive at a solution of the problems arising in connexion with the succession of States in respect of treaties which will gain as widespread an acceptance as possible by the international community.

German Democratic Republic. The Government of the German Democratic Republic considers with regard to State succession in general that it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States. Future rules on succession of States should facilitate the entry into international relations of the successor State and should therefore be such as to enable the latter to enjoy its rights as a sovereign, equal State without hindrance or delay. At the same time it is in the interest of all States that cases of States succession should not disturb international treaty and other relations which were established in accordance with the principles of international law in force and that the previous state of such relations should be maintained.

Sweden. The Swedish Government regarded the draft articles and the commentaries pertaining thereto as a most valuable contribution to the study of a difficult and vital problem in international law and organization. The Swedish Government noted that the Commission had given special attention to the practice of the newly independent States but had observed that, as the era of decolonization was nearing its completion, it was in connexion with other cases that in future problems of succession were likely to arise. In view of that forecast, which was shared by the Swedish Government, it seemed somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a long period of time.

The Swedish Government added,

> Moreover, the draft articles on newly independent States hardly solve the problem to what extent treaties concluded by predecessor States are still valid for States which have achieved independence since the Second World War. They rather tend to confirm the prevailing uncertainty in that respect. The General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, *i.e.*, by an *ad hoc* settlement of an *ad hoc* situation.

Observations and proposals of the Special Rapporteur

13. In the opinion of the Special Rapporteur, there is no doubt about the importance of and need for codification (including progressive development) of the topic of succession of States in respect of treaties. This is so both from the juridical and the practical point of view. The topic involves a significant aspect of the law of treaties whose codification is needed as an important step towards completion of the codification in the Vienna Convention. From the practical point of view, the facts that there are comparatively few dependent territories remaining and that the period of decolonization is drawing to a close in no way diminishes the importance of clarifying the legal position, at least for those territories which have not yet attained independence. For so many States that have acquired independence since the Second World War the whole question of succession in respect of treaties has been beset by doubt and complexity. The fact that comparatively few territories have not yet attained independence does not diminish the importance of making the way as clear and simple as possible for them. The fact that the era of decolonization is drawing to a close only underlines the urgency of the task of codification so far as dependent territories are concerned.

14. On the other hand, many of the comments have brought out the point that in a codification, which must look to the future, all aspects of the topic should be considered with equal care and thoroughness. Every effort should be made to ensure that the articles concerning cases other than that of newly independent States are as satisfactory in substance and as well drafted as the articles concerning those States. It is also necessary, in the opinion of the Special Rapporteur, to ensure that all relevant cases are covered without, however, including cases that do not properly fall within the concept of "succession of States". In this connexion, certain comments have mentioned cases of social revolution and new forms of association of States such as economic integration units or fiscal units. While such cases will, of course, have to be considered seriously, it will be more convenient to examine them subsequently in the present report, particularly in connexion with the scheme of the draft.[16]

15. The Swedish Government, in its written comments, has suggested that the General Assembly might seek a separate solution to treaty problems related to succession connected with decolonization "by an *ad hoc* settlement of an *ad hoc* situation". The Special Rapporteur believes that such an approach would have to face great political obstacles and would run counter to the wishes of the large majority of Member States. The Special Rapporteur

[16] See below paras. 42-48 and 50-57.

does not advise the adoption of any such approach. On the contrary, he proposes that the articles on newly independent States should remain as part of the draft and that, in accordance with the wish of the General Assembly expressed in resolution 3071 (XXVIII), the International Law Commission should complete at its twenty-sixth session the second reading of "the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session".

B. Sources of the draft articles

Comments of Governments

Oral comments

16. Little need be said under this heading. There was a large measure of approval among delegations at the twenty-seventh session of the General Assembly for the sources on which the Commission had drawn. However, a few of the comments made at that session are worth mentioning. Certain representatives stressed that a sharp distinction between the value of the earlier and later precedents should be avoided. The view was also expressed that the practice of depositaries was purely administrative in character and could not be regarded as being binding on States parties or giving rise to a customary rule. Finally, some doubts were expressed whether full justice was done to the many occasions when, without controversy, the States concerned had continued to apply treaties, particularly in the bilateral field.[17]

Written comments

17. Remarks about sources were made in some of the written comments of Governments, such as those of the German Democratic Republic, Sweden and the United Kingdom, but it is more convenient to record them in relation to the context in which they were made. This will be done.

Observations and proposals of the Special Rapporteur

18. While the comments made on sources should and will be borne in mind, it is not considered that they require any observations or proposals by the Special Rapporteur.

C. The concept of "succession of States"

Comments of Governments

19. According to the 1972 report of the Sixth Committee

All representatives who referred to the matter, shared the Commission's view that analogies drawn from municipal law concepts of succession should be avoided. They agreed with the use, for the purpose of the draft articles, of the expression "succession of States" to denote simply the fact of the replacement of one State by another, thus excluding all questions of rights and obligations as a legal incident of that change.[18]

[17] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 34.

[18] *Ibid.*, para. 35.

Observations and proposals of the Special Rapporteur

20. Apart from stressing the importance of these comments as confirming the approach adopted by the Commission, the Special Rapporteur has no observations or proposals to make in this connexion.

D. Relationship between succession in respect of treaties and the general law of treaties

Comments of Governments

Oral comments

21. A number of delegations agreed that State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties would find their appropriate solution and that the task of codification appeared to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than *vice versa*. They endorsed the Commission's approach that the provisions of the Vienna Convention should be taken as an essential framework of the law relating to succession of States in respect of treaties. However, one delegation expressed the view that the analogy with the Vienna Convention was carried too far and that the statement (which is reflected in the two preceding sentences) contained in paragraph 32 of the Commission's report was not acceptable.[19]

Written comments

22. *Denmark.* In the context of general approval of the draft articles, the Danish Government mentioned that they underscored the relationship with the Vienna Convention.

Poland. The Government of the Polish People's Republic deemed that the question of succession of States in respect of treaties should be considered with due regard to the provisions of the Vienna Convention.

United Kingdom. The United Kingdom Government supported the decision of the Commission to take the provisions of the Vienna Convention as an essential framework of the law relating to succession of States in respect of treaties.

United States of America. The Government of the United States stated that the decision of the Commission to maintain, particularly in part I (General Provisions) a substantial parallelism with the Vienna Convention was a sensible one. The United States Government also stated that "the unification of international law is promoted by the adoption of substantially identical texts to the greatest extent that varying subject-matters permit".

Observations and proposals of the Special Rapporteur

23. Although the proposition has been stated in different ways, there has been general approval for the approach of the Commission in taking the Vienna Convention as an essential framework of the law relating to succession

[19] *Ibid.*, para. 36.

of States in respect of treaties. The Special Rapporteur shares the view that the task of codification in this field is one of determining within the law of treaties the impact of the occurrence of a "succession of States" rather than *vice versa*. Nevertheless, in his opinion, heed should be taken of the warning not to carry too far the analogy with the Vienna Convention. In other words, the Commission should be prepared to depart from the exact wording or form of the Vienna Convention if this should be necessary having regard to the particular requirements of the subject-matter of the draft articles now under consideration.

E. The principle of self-determination and the law relating to succession in respect of treaties

Comments of Governments

Oral comments

24. The comments of delegations on the implications of the principle of self-determination made at the twenty-seventh session of the General Assembly are extensively summarized in the report of the Sixth Committee,[20] to which members of the Commission are respectfully referred. The main implication of the principle of self-determination has been the clean slate principle chosen by the Commission as the basic principle for the provisions of the draft articles relating to newly independent States. The clean slate principle did not involve rejection of the continuity of treaties, but did imply that the newly independent State was entitled to choose which treaties concluded by its predecessor would be regarded as continuing and which would be considered as terminated. Although some delegations took the view that the "clean slate" principle might better be based on State sovereignty, and views varied as to the extent to which the application of the clean slate principle should be limited in the draft articles, most delegations accepted the principle as understood by the Commission and reflected in the draft articles. The clean slate principle was also supported by some delegations at the twenty-eighth session of the General Assembly.[21]

25. At the twenty-seventh session of the General Assembly a few delegations expressed reservations about the application given to the clean slate principle by the Commission, especially in part V of the draft which excluded "dispositive", "localized" or "real" treaties from the scope of the clean slate principle.[22] On the other hand, certain representatives considered that the "clean slate" principle had also a natural application in cases concerning a change of régime in a State as a result of a social revolution which might cause such a State to modify radically its position with regard to its international relations. They could therefore not accept the restrictive application of that principle in the draft articles to newly independent States only.[23]

26. Opposition to reliance on the clean slate doctrine was expressed by the Swedish delegation of 26 September 1973 in the Sixth Committee at the twenty-eighth session of the General Assembly. Since the views of the Swedish Government have been restated in its written comments, the summary of the comments made by the Swedish delegation will be brief. The representative of Sweden in the Sixth Committee said that his Government was not convinced that State practice was consistent enough to form the basis of "firm and clear" customary law in that matter, and that the Commission itself had stated that conflicting views had been expressed and followed in practice. In his Government's view, with respect to multilateral treaties and certain types of bilateral treaties there were factors that pointed in the direction of a need for continuity in treaty relations rather than for a clean slate. He questioned the application given to the principle of self-determination in the case of newly independent States. For the reasons he had given, his Government considered that it might be worth while attempting to create a system or model based not on the clean slate doctrine but on the opposite principle that a new State continued to be bound by treaties concluded by the predecessor State, coupled with an extensive right of the new State to denounce undesirable treaties. He said that the question of the legal consequences of succession of States was, as a whole, one of the most controversial fields of international law and that State practice was inconsistent and obscure and doctrine was confusing owing to an abundance of conflicting views. He regarded codification in this field as mainly a legislative task where abstract principles and juridical logic were less important than common sense and a will to conciliate conflicting interests and to maintain friendly and orderly relations within the international community.[24]

Written comments

27. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic, in giving consideration to the draft articles, took a favourable view, in particular, of the clean slate principle on which the substance of the draft was based, under which a newly independent State is not committed to the treaties concluded by former metropolitan powers. In this context, the Czechoslovak authorities also drew attention to "States which came into being as a result of a social revolution".

Denmark. The Danish Government when expressing the general acceptibility of the draft articles stated,

> Particularly the implications of the "clean slate" principle in relation to bilateral treaties should today—in the light of the practice of States and the basic principle of equal rights and self-determination of peoples—be considered accepted customary rules of international law. This view is also in keepting with the practice observed so far in Denmark when dealing with specific cases of treaty succession.

[20] *Ibid.*, paras. 37-49.

[21] See *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1401st meeting, para. 13 (Kenya), and *ibid.*, 1406th meeting, para. 25 (Zambia) and para. 36 (Indonesia).

[22] *Ibid., Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 43-44.

[23] *Ibid.*, para. 38.

[24] *Ibid., Twenty-eighth Session, Sixth Committee*, 1398th meeting, paras. 12-18. See also the report of the Sixth Committee (*ibid., Annexes*, agenda item 89, document A/9334, para. 119).

German Democratic Republic. In the view of the Government of the German Democratic Republic, the clean slate principle in cases of succession resulting from decolonization is a basically correct point of departure in this context.

Poland. In the opinion of the Government of the Polish People's Republic, the Commission rightly applied the clean slate principle in the case of the newly independent States—as required by the principle of self-determination of nations and sovereignty of States.

Somalia. The comments of the Government of the Somali Democratic Republic, though they are in fact related to the application of the clean slate principle, are concerned with part V of the draft articles dealing with boundary régimes and other territorial régimes established by treaty. Accordingly, they will be considered in the context of part V.

Sweden. The Swedish Government commented that more than half of the draft articles concerned State succession in the case of newly independent States. The Government recalled that the Commission had given special attention to the practice of the newly independent States referred to in General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963. On the other hand, the Commission had observed that the era of decolonization was nearing its completion and that it was in connexion with other cases—such as succession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States—that in the future problems of succession were likely to arise. The Swedish Government shared this forecast, and commented that it seemed somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a long period of time. Moreover, the draft articles tended to confirm the prevailing uncertainty and hardly solved the problem of succession in respect to treaties for newly independent States. The Swedish Government suggested that the General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e., by an *ad hoc* settlement of an *ad hoc* situation.

The Swedish Government observed that the relevant draft articles were based on a so-called clean slate doctrine and that article 11 and the other articles provided for newly independent States a combination of non-obligation and the right to establish status as a party (in some cases without, in others with, the consent of other parties) which might prolong the uncertainty regarding the new State's treaty relations instead of offering workable solutions.

According to the Swedish Government, for the Commission the clean slate doctrine is a codification of existing international law and the Commission considers that the doctrine derives from State practice and is confirmed by the principle of self-determination. In the view of the Swedish Government, however, the description of practice given in the Commission's commentaries rather shows that conflicting views have been expressed and followed in practice, and that consequently practice is far from being consistent.

The Swedish Government criticized the extent to which the Commission relied on the practice of the Secretary-General and other depositaries, which could not in itself bind the parties. Silence by a party to a treaty when notified that a new State did not consider itself obligated by the treaty did not necessarily imply that the party agreed or conceded that the new State was not bound. In other words, it was doubtful whether an adequate *opinio juris* could be deduced from the practice of depositaries and parties in this matter. With respect to multilateral treaties, such as the Red Cross Conventions, the practice of newly independent States did not seem to be wholly consistent. Similarly, the Swedish Government commented, the Commission stated that there was a "considerable measure of continuity found in practice" in regard to certain categories of bilateral treaties. In these circumstances, it was difficult to see how a clean slate principle could be derived from current State practice with respect to bilateral treaties.

Nor did it seem possible to base the clean slate doctrine on the principle of self-determination, an admittedly vague principle the substance of which is that nations of peoples have a right to political independence. It was not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State (articles 26 and 27).

If, as seemed to be the case, practice and principles such as self-determination of peoples did not give sure guidance, the task to be accomplished seemed to be not so much codification of customary law as progressive development. Accordingly, practical considerations could and should be allowed to influence the preparation of the written rules.

The Swedish Government maintained that, from the practical point of view, the application of the clean slate doctrine was likely to cause serious inconvenience. There would be uncertainty for the new State and it was arguable that the doctrine would not be in conformity with the general interest of States.

The Swedish Government suggested that, in view of these considerations, it might be worth while attempting to create a system or model based on the principle that the new State continues to be bound by the treaties concluded by the predecessor State. The application of that principle would seem to maintain stability and clarity in treaty relations. It might then be possible to incorporate an extensive right to denounce undesirable treaties and to provide that certain categories of treaties, such as treaties of alliance and military treaties, would not be binding on the successor State. There were obviously many other features and details of such a system which would have to be studied and worked out.

In the view of the Swedish Government, the establishment of an alternative model on these lines would be a great help to Governments in deciding what attitude to take with respect to the very difficult problems related to State succession in respect of treaties. Without express-

ing a definitive opinion on the 'clean slate' model or on an opposite system, the Swedish Government would welcome an alternative draft of articles based on the opposite assumption that the new State inherits the treaties of the predecessor (possibly with the exception of certain categories) but has the right in a manner to be regulated in the draft to denounce such treaties (with the exception of "territorial" treaties). Such an alternative would simplify the drafting of rules for the future. Many of the provisions contained in the part dealing with "newly independent States" (such as, e.g., those on "provisional application") would be unnecessary, and this part and the part dealing with "separation of part of a State" could be combined, which would eliminate a distinction which seems rather artificial or in any case difficult to define.

United Kingdom. The United Kingdom Government, referring to the introduction to the draft articles,[25] noted that the principles of the United Nations Charter, and in particular that of self-determination, were considered by the Commission to have "implications" in the modern law concerning succession in respect of treaties, the main implication in its opinion being "to confirm" the clean slate principle. The United Kingdom Government continued to have doubts as to whether full weight had been given to the many instances in which, without controversy, States concerned had continued to apply treaties after a succession of States. Where there had been controversies, these had usually been satisfactorily resolved without too much difficulty. The United Kingdom Government commented that, whilst a succession of States marked a time of change, it was usually in the interests of all States concerned to maintain as much of the essential fabric of international society (in which treaties played an important part) as was consistent with the change. This was especially the case with multilateral treaties of a law-abiding character or which established international standards.

United States of America. The Government of the United States considered that the draft articles constituted a sound basis for consideration of this difficult topic and supported the general approach taken in part III of the draft articles, regarding newly independent States.

Observations and proposals of the Special Rapporteur

28. In the context of the clean slate principle, certain delegations commented that it had a natural application in cases concerning a change of régime in a State as a result of a social revolution.[26] Written comments in a similar sense were made by Czechoslovakia and the German Democratic Republic. As indicated above,[27] these comments will be considered later.[28]

29. The reasoned arguments presented in the oral and written comments of the Swedish Government, as well as the doubts expressed by the United Kingdom Government are, in principle, worthy of most careful consideration.[29] Indeed, in the opinion of the Special Rapporteur it cannot be said with confidence that there is an established and generally accepted rule of customary international law that a newly independent State is in general free from obligation in respect of its predecessor's treaties. Nevertheless, the tendency of modern practice and doctrine has been in that direction, and the clean slate metaphor as understood and applied by the Commission is more in accordance with than contrary to that practice and doctrine. Moreover, overwhelming support for the clean slate doctrine has been expressed by Member States. On the other hand, the Swedish Government does not definitively reject the clean slate model, nor does the United Kingdom Government go beyond the expression of doubts whether the principles of the Charter of the United Nations, in particular that of self-determination, and practice concerning the continuity of treaties have confirmed the clean slate principle. Thus, the weight of opinion is clearly in favour of the clean slate principle rather than that of the continuity of treaty rights and obligations in the case of newly independent States.

30. Nevertheless, this approach seems to be dictated as much by practical considerations as by requirements of law. Therefore, there is room for consideration of the suggestion made by the Swedish Government that it might be worth while attempting to create a system or model based on the principle that the new State continues to be bound by the treaties concluded by the predecessor State. However, the Special Rapporteur does not think that it would be appropriate for him to prepare an alternative set of draft articles on the lines contemplated by the Swedish Government without a decision of the Commission to that effect. He will, of course, be willing to do his best to prepare such a set of draft articles if that should prove to be the wish of the Commission. But having regard to the comments of Governments, that is not a course that he could recommend. Moreover, it would not be consistent with the decision of the Commission, endorsed by the General Assembly. to complete the second reading of the draft articles at its twenty-sixth session. The alternative would involve a major departure of principle and detail from the Commission's draft articles and the preparation of the alternative set of draft articles would take so much of the Commission's time that it would imperil the completion of the draft. Accordingly, the Special Rapporteur proposes that the Commission should not accede to the suggestion of the Swedish Government but should proceed with the detailed examination of the articles already drafted on the basis of the clean slate principle.

[25] *Yearbook ... 1972*, vol. II, p. 227, document A/8710/Rev.1, paras. 35-36.

[26] See above para. 25.

[27] See para. 14.

[28] See paras. 50-57 below.

[29] In its letter dated 30 April 1973 (see above, para. 7 and footnote 9), the Government of Tonga also criticizes the extent to which the International Law Commission has relied on the clean slate doctrine with special reference to draft article 11. Although account has been taken of the observations made by the Government of Tonga, it is more convenient to consider them in detail elsewhere, e.g., in relation to article 11 (see paras. 215-217 below).

F. Form of the draft

Comments of Governments

Oral comments

31. According to the 1972 report of the Sixth Committee, most of the delegations who referred to this question considered that to cast the results of the study in the form of a group of draft articles which could eventually serve as a basis for the conclusion of a convention was the most appropriate way of codifying the rules of international law relating to succession of States in respect of treaties. Some delegations, however, underlined the anomaly of giving a conventional form to the codification of the topic, since a succession of States in most cases brings into being a new State which under the clean slate principle could not be bound by the convention until it became a party thereto in its own behalf. This apparent anomaly was explained by other delegations by reference to the interpenetration between customary and conventional international law and the working of the codification process. Moreover, prior knowledge derived from a convention would be helpful to the authorities of a new State and, since the proposed convention was designed to leave all options open to newly independent States, it was unlikely that they would be reluctant to participate in it.[30]

Written comments

32. *Denmark.* The Danish Government commented that the draft articles might be used in the preparation either of a convention or of a code which is not legally binding, but considered that it seemed preferable to aim at the adoption of a legally binding convention. The fact that a convention, as a result of the general rule on non-retroactivity of treaties, would normally not be binding upon a successor State in respect of its own terms of succession was hardly a sufficient argument against using the convention as an instrument, as pointed out by the International Law Commission itself in the report on the work of its twenty-fourth session.[31] In the opinion of the Danish Government, a convention rather than a non-binding code might serve more adequately to determine what would be considered generally accepted international law ragarding succession in respect of treaties and consequently be a guide to all States. A convention would, moreover, in any event be binding in the relationships which with respect to State succession would emerge between a predecessor State and third States when those States had become parties to the convention. Finally, the Danish Government suggested that consideration might be given to the insertion in a prospective convention of an optional clause on retroactivity relative to new States.

German Democratic Republic. The Government of the German Democratic Republic stressed the close interrelation between succession in respect of treaties and succession in respect of matters other than treaties and expressed itself in favour of a single convention comprising both aspects of State succession; and considered that, if there were separate texts, at least uniform principles should be established in both of them.

Poland. The Government of the Polish People's Republic supported the codification of norms regulating succession of States in respect of treaties in the form of a convention, as the provisions of the codification being drafted should enjoy a legal standing equal to the Vienna Convention.

United Kingdom. The United Kingdom Government favoured the drawing up by the Commission of a final set of draft articles for a convention. Whilst noting the temporal element in any codification and development of the law of succession of States, they considered a convention to be the best type of instrument in the present state of international society. In this connexion it was noted that the International Court of Justice in some of its recent judgements had cited the Vienna Convention even thought it was not in force and when in force would not be retrospective.

Observations and proposals of the Special Rapporteur

33. The main question that has been raised in connexion with the form of the codification of the law relating to succession of States in respect of treaties is whether it should be effected in the form of a convention. It will be appropriate for the Commission to make its recommendations on this question, as indicated in its report,[32] when it has completed the second reading of the draft articles. As the second reading should be completed at the forthcoming twenty-sixth session, it will be appropriate for the Commission to make its recommendations on this matter before the end of that session.

34. The principle objection to embodying the draft articles in a convention, recognized in the Commission's report, and in a number of comments by Governments, is a theoretical one. The objection, as expressed by the Commission itself, is,

> Since a succession of States in most cases brings into being a new State, a convention on the law of succession of States would *ex hypothesi* not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party.[33]

35. There can be no doubt that from a theoretical point of view this objection is a cogent one in the sense that a convention on succession in respect of treaties would, by reason of the intrinsic nature of the situation, not have the direct binding effect that would normally flow from a convention. Nevertheless, even from this point of view, a convention would have the merit that it would regulate and, if well drafted, clarify the relevant treaty relations between the predecessor State and other States parties to the treaties in question on the assumption that they were

[30] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 50-51.

[31] *Yearbook ... 1972*, vol. II, p. 228, document A/8710/Rev.1, para. 41.

[32] *Ibid.*, pp. 227-228, document A/8710/Rev.1, para. 39.

[33] *Ibid.*, p. 228, document A/8710/Rev.1, para. 41.

all parties to the convention. Thus, to this limited extent, a convention would have direct legal value for the parties to it.

36. On the other hand, it should be noted that most of the Governments which have commented on the draft articles have favoured the form of a convention. There are basically three reasons for this attitude. First, the articles in the form of a convention would provide guidance to new States in dealing with questions arising from the succession of States. This reason is given, *inter alia*, in the Commission's report.[34] In itself, this reason does not seem to be very cogent, because much the same might be said of a declaratory code or a model. However, experience has shown that a convention is likely to be regarded as more authoritative in character and, accordingly, to be more effective as a guide.

37. Secondly, the articles, if adopted in the form of a convention, might contribute to the establishment of generally accepted rules of international law. The extent to which this might in fact prove to be the case would depend on the intrinsic merit of the draft articles, as reflecting customary international law or as providing sensible and acceptable solutions in areas of doubt, and on the support consequently given by States to the convention. If the majority of States became parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile. This, if the convention form is to be recommended, is an added incentive to try to produce a set of draft articles which over all is likely to appeal to Governments. On the assumption that a convention on succession of States in respect of treaties would receive wide support, the possible contribution to the development of customary international law does appear to be a good reason for adopting this form.

38. Thirdly, there has been general support for the view that the draft articles on succession of States in respect of treaties should be drafted on the basis of or in parallel with the provisions of the Vienna Convention. If so, it may be right to regard the articles on succession of States in respect of treaties as supplementary to the provisions of the Vienna Convention. In that case, it would be appropriate to give these articles the same status as the Vienna Convention, i.e., to establish them in the form of a convention.

39. While recognizing the unavoidable shortcomings in the legal effects of a convention on succession of States in respect of treaties, having regard to the reasons mentioned above, the Special Rapporteur is of the opinion that it would be useful for the draft articles on this topic to be incorporated in a convention in the hope that it will receive a wide measure of support from States. Accordingly, he proposes that the Commission should continue with the preparation of the draft articles in a form suitable for incorporation in a convention and that in due course the Commission should recommend the draft to Members with a view to the conclusion of a convention.

40. It remains to consider the suggestion, made in the written comments of the Danish Government,[35] that an optional clause on retroactivity relative to new States might be inserted in a prospective convention. It is not clear to the Special Rapporteur exactly what would be the nature and content of such a clause, or whether there is any need for an *optional* clause of a *general* character. The draft articles on succession of States in respect of treaties, while they contain articles 3 and 4 corresponding respectively to articles 3 and 5 of the Vienna Convention, do not contain a general clause on non-retroactivity corresponding to article 4 of that Convention. It appears that the technique adopted in the draft articles on succession of States in respect of treaties is to provide for retroactive effect in each of the articles as and when required. For example, paragraph 3 of draft article 9 provides that, in cases falling under paragraph 1 or 2 of the article, "a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed". The point is stressed in paragraph 13 of the commentary on draft article 9 which says,

> Paragraph 3, therefore, intends to ensure continuity of application by providing that, as a general rule, the successor State, if it consents to be considered as a party, in cases falling under paragraph 1 or 2 of the article, will be so considered *as from the date of the succession of States*.

The provision would apply to the successor State even if (which is quite likely to be the case) it became a party to the convention on succession of States in respect of treaties at a date later than the date of the succession of States. If the successor State exercised one of the options provided by paragraph 1 or 2 of the article with respect to a particular treaty the effect would be retroactive to the date of the succession of States. This, in the view of the Special Rapporteur, is implicit in the provisions of paragraph 3 of draft article 9, and, in relation to cases falling within that article, it would be unnecessary and confusing to include in the convention an article giving a successor State a general right to opt for retroactivity.

41. Nevertheless, in the light of the Danish Government's comments, it will be necessary to consider whether each specific article in the draft contains the element of retroactivity required to ensure the proper continuity of treaty relations for the successor State. Consideration should also be given to the question whether the draft articles should themselves contain an option of the kind contemplated in paragraph 1 of draft article 9, i.e., for a successor State to consider itself a party to the convention if the predecessor State was already a party, and for that option, when exercised, to have effect so that the successor State is considered as a party to the convention from the date of the succession.

G. Scope of the draft

Comments of Governments

Oral comments

42. According to the Sixth Committee's 1972 report,[36] the scope of the draft articles, as described in the Com-

[34] *Ibid.*

[35] See para. 32 above.

[36] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 52.

mission's report,[37] was generally endorsed at the twenty-seventh session of the General Assembly. One delegation, however, criticized the scope of the draft for having excluded treaties concluded by international organizations. In the Sixth Committee's report, the views of that delegation [38] are summarized in the following sense. The exclusion of treaties concluded by international organizations would leave outside the scope of the draft certain cases of succession resulting from the participation of States in certain hybrid unions, like customs unions and common markets. Such unions might obtain an exclusive right to enter into trade agreements, as in the case of EEC under the Treaty of Rome. Trade agreement partners of the individual States forming the union, prior to its establishment, might not be sufficiently helped by providing that they would always have a right to claim damages from the States entering into the union. They might have a real interest in obtaining some legal relationship with the successor organization. In such a context, a sharp distinction between treaties made by States and treaties made by international organizations would seem objectionable.

Written comments

43. No written comments were received.

Observations and proposals of the Special Rapporteur

44. It may be noted that, although the suggestion for the extension of the scope of the draft articles was made by the Netherlands delegation early in the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, it was not supported by any other delegation either at that session or at the twenty-eighth session of the General Assembly or in the written comments of Governments.[39] Nevertheless, as in the case of other comments, it should be considered on its merits, bearing in mind of course the views of other Governments and of the General Assembly as a whole.

45. In this perspective, however, there are strong reasons for not pursuing the suggestion of the Netherlands delegation. As stated in the Commission's report, its decision in 1963 to limit its study to succession of States, as distinct from succession of Governments, was endorsed by the General Assembly and it followed that the draft did not deal with any questions concerning the succession of subjects of international law other than States, in particular international organizations. Thus, the point was expressly called to the attention of the General Assembly, which, nevertheless, by resolution 3071 (XXVIII) [40] recommended that the Commission should complete "the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session". On a point so fundamental to the scope of the draft articles, no doubt the General Assembly would have indicated its intention if it had wished the articles to be extended to questions of succession relating to international organizations.

46. Moreover, the oral and written comments of Governments have shown general approval for the approach of the Commission taking the Vienna Convention as an essential framework of the law relating to succession of States in respect of treaties. The Vienna Convention is limited to treaties between States and does not extend to treaties concluded between States and international organizations or between international organizations. Accordingly, it would not be consistent with reliance on the Vienna Convention "as an essential framework" to extend the draft articles so as to comprise cases of "succession of international organizations in respect of treaties". Such an extension would be especially undesirable when the Commission itself has under study, as pointed out in its report, the question of treaties concluded between States and international organizations or between two or more international organizations which was then and still is in its early stages.

47. Finally, there are difficulties of principle in the way of the suggestion of the Netherlands delegation. The kind of "succession" contemplated would be different in character from the kind of "succession" contemplated in the draft articles. As at present drafted, according to article 2, paragraph 1 (*b*) "succession of States" means "the replacement of one State by another in the responsibility for the international relations of territory". "Replacement" seems to contemplate *complete* replacement and not *partial* transfer or conferment of powers to conclude treaties. The fact of succession by replacement is one thing: the conferment of exclusive powers in a limited field is something quite different. The legal consequences of giving an international organization exclusive powers to negotiate and conclude treaties either on its own behalf or on behalf of its members are likely to be regulated by the international instrument by which they are given. These consequences may vary from case to case. The mere fact that exclusive powers in a certain field are conferred on an international organization will not necessarily mean that the existing treaty obligations of the member States will be immediately and automatically terminated, or indeed that they will necessarily be terminated otherwise than through negotiation. This will depend on the terms of the treaty establishing the organization or conferring the relevant powers on it.[41] In principle, it is in that context that the States concerned should safeguard the legal position with respect to the other parties to any treaty that may be affected.

[37] *Yearbook ... 1972*, vol. II, p. 228, document A/8710/Rev.1, paras. 42-43.

[38] See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 53. For a fuller summary of the statement made the delegation in question (the Netherlands delegation), see the summary record of the relevant meeting of the Sixth Committee (*ibid., Sixth Committee*, 1317th meeting, paras. 15-20).

[39] At the twenty-seventh session of the Assembly, however, the delegation of Uruguay wondered what the situation would be if a State renounced part of its obligations under bilateral treaties at the time when it joined an international organization and what would happen to bilateral economic treaties when a State decided to join a multinational economic organization (*ibid.*, 1318th meeting, para. 10).

[40] See para. 1 above.

[41] The provisions touching this matter contained in the Treaty establishing EEC (done at Rome on 25 March 1957) are complex. The following are among the relevant articles:

48. For all these reasons, the Special Rapporteur considers that it would not be appropriate to accede to the suggestion made by the Netherlands delegation, and proposes that the Commission should adhere to the scope of the draft articles indicated in its report and for which provision is made in the draft articles.

H. Scheme of the draft

49. The 1972 report of the Sixth Committee deals with a number of points under the heading "Scheme of the

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Article 2

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Article 3

For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty:

...

(*b*) the establishment of a common customs tariff and a common commercial policy towards third countries;

...

(*k*) the association of overseas countries and territories with the Community with a view to increasing trade and to pursuing jointly their effort towards economic and social development.

...

Article 111

In the course of the transitional period and without prejudice to Articles 115 and 116, the following provisions shall apply:

1. Member States shall co-ordinate their commercial relations with third countries in such a way as to bring about, not later than at the expiry of the transitional period, the conditions necessary to the implementation of a common policy in the matter of external trade.

The Commission shall submit to the Council proposals regarding the procedure to be applied, in the course of the transitional period, for the establishment of common action and regarding the achievement of a uniform commercial policy.

2. The Commission shall submit to the Council recommendations with a view to tariff negotiations with third countries concerning the common customs tariff.

The Council shall authorise the Commission to open such negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

3. The Council shall, when exercising the powers conferred upon it under this Article, act during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote.

4. Member States shall, in consultation with the Commission, take all necessary measures with the object, in particular, of adjusting their tariff agreements in force with third countries in order that the entry into force of the common customs tariff may not be delayed.

5. Member States shall aim at securing uniformity between themselves at as high a level as possible of their lists of liberalisation in regard to third countries or groups of third countries. For this purpose the Commission shall make any appropriate recommendations to Member States.

If Member States abolish or reduce quantitative restrictions in regard to third countries, they shall inform the Commission beforehand and shall accord identical treatment to the other Member States.

Article 112

1. Without prejudice to obligations undertaken by Member States within the framework of other international organisations, their measures to aid exports to third countries shall be progressively harmonised before the end of the transitional period to the extent necessary to ensure that competition between enterprises within the Community shall not be distorted.

On a proposal of the Commission, the Council, acting until the end of the second stage by means of a unanimous vote and subsequently by means of a qualified majority vote, shall issue the directives necessary for this purpose.

2. The preceding provisions shall not apply to such drawbacks on customs duties or charges with equivalent effect nor to such refunds of indirect charges including turnover taxes, excise duties and other indirect taxes as are accorded in connection with exports of goods from a Member State to a third country, to the extent that such drawbacks or refunds do not exceed the charges which have been imposed, directly or indirectly, on the products exported.

Article 113

1. After the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies.

2. The Commission shall submit proposals to the Council for the putting into effect of this common commercial policy.

3. Where agreements with third countries require to be negotiated, the Commission shall make recommendations to the Council, which will authorise the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

4. The Council shall, when exercising the powers conferred upon it by this Article, act by means of a qualified majority vote.

Article 114

The agreements referred to in Article 111, paragraph 2, and in Article 113 shall be concluded on behalf of the Community by the Council acting during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote.

...

Article 228

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only entre into force under the conditions laid down, according to the case concerned, in Article 236.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.

...

Article 234

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member

(Continued on next page.)

draft".[42] Several of these points relate to particular draft articles and are more conveniently considered in connexion with the draft articles to which they relate. It is also intended to deal with the question of the settlement of disputes, mentioned in the Sixth Committee's report,[43] at the end of the present report. At this stage, consideration will be given to "categories of succession of States", "categories of treaties" and "arrangement of the draft articles" corresponding to the relevant paragraphs of the Commission's report.[44]

1. Categories of succession of States

Comments of Governments

Oral comments

50. According to the Sixth Committee's report some delegations supported the conclusion of the Commission that, for the purpose of codifying the law of succession of States in respect of treaties, it would be sufficient to arrange cases of succession of States under three broad headings: (*a*) transfers of territory; (*b*) newly independent States; (*c*) the uniting of States, the dissolution of a State and the separation of part of a State. Other representatives stated that such an arrangement implied serious omissions, because it did not take into account the very important case of a change of régime in a State as a result of a social revolution.

51. The last-mentioned point was raised by the delegation of the Union of Soviet Socialist Republics on 6 October 1972 in the Sixth Committee and was subsequently mentioned in the Sixth Committee at the twenty-seventh session of the General Assembly by the delegations of Mongolia, Hungary, the Byelorussian Soviet Socialist Republic and Bulgaria. It was also mentioned by the delegation of the German Democratic Republic in the Sixth Committee at the twenty-eighth session of the General Assembly. The following were, according to the summary records of the debates in the Sixth Committee, the comments made by those delegations concerning this point:

Union of Soviet Socialist Republics. There were, however, some serious omissions in the draft articles. As stated in paragraph 45 of the report, the Commission had confined itself to arranging the cases of succession of States under three categories, comprising respectively, transfers of territory, newly independent States, and cases of the uniting of States and the dissolution of a State; however, it did not take into account the very important case of a change of régime in a State as a result of a social revolution, which might cause such a State to modify radically its position with regard to its international relations. The Soviet Union, for example, after the October revolution, had denounced all treaties concluded by the previous régime which were not in keeping with the people's sense of justice; the new socialist States of Eastern Europe and China and Cuba had proceeded in the same manner. The clean slate principle had a natural application in such cases—the French bourgeois revolution had had recourse to it in 1792—and his delegation could therefore not accept the restrictive application of that principle in the draft articles only to States which had liberated themselves from colonial rule.[45]

Mongolia. Special mention should be made of the problem of succession in respect of treaties in the event of social revolution. That important subject had, unfortunately, been neglected in the draft articles. The practice of States showed that, in cases of social revolution, the successor State had the right to terminate unacceptable treaties, while continuing in force those treaties which were in accordance with the generally accepted principles of international law. The silence of the draft articles concerning the problem of succession in respect of treaties in the event of social revolution represented a serious omission which, it was to be hoped, would be corrected by the Commission in its further discussion of the draft articles.[46]

Hungary. His delegation regarded Part III of the draft as the most important. However, it regretted to note a number of gaps in the draft articles, which failed to cover certain special cases of succession. The practice concerning other new States was more difficult to codify than in the case of newly independent States and work

(Foot-note 41 continued)

States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.

...

Article 237

Any European may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote.

The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules.

Article 238

The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.

Such agreements shall be concluded by the Council acting by means of a unanimous vote and after consulting the Assembly.

Where such agreements involve amendments to this Treaty, such amendments shall be subject to prior adoption in accordance with the procedure laid down in Article 236.

[For the full text of the Treaty of Rome, see United Nations, *Treaty Series*, vol. 298, pp. 3 *et seq.*]

[42] See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 54-63.

[43] *Ibid.*, para. 62.

[44] *Yearbook ... 1972*, vol. II, p. 229, document A/8710/Rev.1, paras. 45, 46 and 49.

[45] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 34.

[46] *Ibid.*, 1325th meeting, para. 48.

in that area was more in the nature of progressive development.[47]

Byelorussian Soviet Socialist Republic. With reference to the deficiencies, it was unfortunate that the Commission had classified cases of succession into only three broad categories, passing over in silence such important cases of succession as that occurring as a result of social revolution. He mentioned the treaty of military and economic union concluded in January 1921 between the Government of the Russian Federative Socialist Republic and the Government of the Byelorussian Soviet Socialist Republic confirming the two parties' independence and sovereignty; article 2 of that treaty stated that the Byelorussian SSR was not under any obligation to any party whatsoever by virtue of its having previously belonged to the Russian Empire . . . It was unfortunate that in its commentaries the Commission had not given a single example of succession practice concerning other socialist States in which the "clean slate" principle had been specifically applied, and that it had devoted its commentary primarily to the policy of "decolonization" pursued by the former metropolitan countries".[48]

Bulgaria. The provisions of article 1 and of article 2, paragraph 1 (*b*) and 1 (*f*), appeared to indicate that the scope of the draft articles was a rather limited one. It was true that the Commission had emphasized that article 2 excluded both succession of Governments and succession of other subjects of international law; however, it should at least have mentioned that the succession of States in the event of social revolution was also excluded.[49]

German Democratic Republic. As a legal successor to the former German Reich, the German Democratic Republic took an interest in the codification of rules on State succession. State succession, both as a result of national liberation movements and as a result of revolution, as well as in cases of unification, separation or dissolution of States, was an important matter for the development of international relations.[50]

Written comments

52. *Czechoslovakia.* In connexion with the expression of its favourable view of the clean slate principle for "newly independent States", the Czechoslovak Government wished to point to the fact that new States come into existence not only in the process of decolonization, but also in other ways. In that context, the Czechoslovak Government wished to draw attention to the States which came into being as a result of a social revolution and asked that article 2, paragraph 1, of the draft should be appropriately amended in that sense.

German Democratic Republic. The Government of the German Democratic Republic considered with regard to State succession in general that "it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States." The Government observed that the draft articles on succession of States in respect of treaties proceeded from the clean slate principle in cases of succession resulting from decolonization and expressed the view that this was a basically correct point of departure in that context. In its hard core the draft covered decolonization comprehensively, but it did not sufficiently take account of the fact that the process of decolonization had come to its end, save for a few exceptions. Therefore, according to the Government of the German Democratic Republic, it appeared appropriate to call attention to the fact that new States might also emerge by way of social revolution and that the same principles should be applicable to them as were applied to States emerging by way of decolonization. Bearing this in mind, it was obvious that the term "newly independent State" in article 2, paragraph 1 (*f*), was inadequate in those respects. The Government of the German Democratic Republic held the view that the term in question should be replaced with a notion of successor State which would cover all successor States in so far as they were new States. That meant that those successor States which had emerged from social revolution should also be covered, along with those which had emerged from the uniting of States, the dissolution of States and the separation of States.

Observations and proposals of the Special Rapporteur

53. It is not possible from the 1972 report of the Sixth Committee or from the comments of Governments to form a clear view as to the opinions of Governments on the inclusion of any form of revolution among the circumstances giving rise to a succession of States for the purposes of the articles on succession of States in respect of treaties. On the one hand, there are comments by a comparatively small number of delegations in the Sixth Committee and the written comments of two Governments, while on the other there is a large measure of approval for the draft articles as a whole without mention of the problem arising from a social or any other kind of revolution. In these circumstances, it seems to the Special Rapporteur that it is a fair inference that there has not been a wide measure of support for the inclusion of cases of revolution and that the large majority of Governments of Member States are satisfied with the scheme of the draft articles adopted by the Commission under the three broad headings: (*a*) transfers of territory; (*b*) newly independent States; (*c*) the uniting of States, the dissolution of a State and the separation of part of a State.[51] One point that does seem to be clear is that a change of internal régime brought about by revolution is not within the framework of that scheme.

54. The problem raised by the oral and written comments of Governments quoted above was apparently not discussed by the Commission during consideration of the

[47] *Ibid.*, para. 52.

[48] *Ibid.*, 1326th meeting, para. 41.

[49] *Ibid.*, para. 45.

[50] *Ibid., Twenty-eighth Session, Sixth Committee*, 1399th meeting, para. 25.

[51] See para. 50 above. See also foot-note 44.

draft articles at its twenty-fourth session. However, when replying to the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, the Chairman of the International Law Commission said,

> The Commission had been criticized for neglecting the situation where the political or social structure of a State was overturned. That was however a question which went beyond the realm of succession and related to the very conception of what a State was. That very complex matter came within the sphere of political philosophy and the Commission had not attempted to deal with it.[52]

55. The question of the effect of a revolution may raise interesting legal questions in the field of the law of treaties. Nevertheless, it seems to the Special Rapporteur that this problem raises issues, not only with respect to the scheme of the draft articles but also with respect to their scope. The Commission in the commentary to draft article 1,[53] stressed that the article gave effect to its decision that the draft articles should be confined to succession of States in respect of treaties and that, by using the words "the effects of succession of States", the article was designed to exclude "succession of governments" from the scope of the draft articles. The commentary then pointed out that this restriction of the "scope" of the draft articles found further expression in article 2, paragraph 1 (*b*), which provided that the term "succession of States" meant for the purposes of the draft articles "the replacement of one State by another . . . ". In the view of the Special Rapporteur, at least in the large majority of cases, a revolution or *coup d'état* of whatever kind brings about a change of *government* while the identity of the State remains the same. In other words, the problem of the effect of a revolution as regards the question of succession in respect of treaties, if it were to be considered, would fall within the scope of "succession of governments" rather than within that of "succession of States". To embark on such a major change of approach at this stage of the work of the Commission would not, in the light of the comments of Governments as a whole, appear to be the right course.

56. It might be argued that distinctions should be drawn between different kinds of revolution; but such a course would involve very difficult questions of definition which would not be solved simply by describing a particular kind of change of régime as a "social revolution". Moreover, such questions would inevitably be charged with overtones of a political and philosophical character which it would probably be beyond the capacity of the International Law Commission to answer satisfactorily within the space of a single session. Furthermore, even if the questions of classification and definition could be answered there would still be formidable obstacles in the form of questions as to the consequences of a change of régime as a result of a revolution.

57. Analysis of the comments of Governments would disclose differences of approach and of details, but it is not considered that, having regard to the foregoing considerations, such an analysis would be fruitful. In this highly controversial context, the Special Rapporteur hesitates to make a firm proposal. He suggests, however, that the Commission might take the lead from the comments of the Bulgarian delegation [54] and point out in the commentary to article 1 that it had also excluded from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution.

2. Categories of treaties

Comments of Governments

Oral comments

58. The 1972 report of the Sixth Committee [55] records that certain delegations stressed that the Commission should give more detailed consideration to the different categories of treaties which should be distinguished in the draft. Recalling the question of law-making treaties,[56] it was suggested that it might be appropriate, and would help in some contexts, to make a tripartite distinction in respect of multilateral treaties (general multilateral treaties; normal multilateral treaties; multilateral treaties of limited participation) instead of the distinction between multilateral treaties and multilateral treaties of limited participation. It was said that under the category of "general multilateral treaties" would fall, to use the wording of the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties,[57] multilateral treaties which dealt with the codification and progressive development of international law or the object and purpose of which were of interest to the international community as a whole.

Written comments

59. No written comments have been received suggesting the addition of "general multilateral treaties" as a third category of multilateral treaties.

Observations and proposals of the Special Rapporteur

60. After considerable discussion at the United Nations Conference on The Law of Treaties in 1968 and 1969, it was decided not to add "general multilateral treaties" as a separate category of multilateral treaties. The resulting classification in the Vienna Convention, based on participation, is for most purposes between bilateral and multilateral treaties. For the purposes of article 20 of the Convention, account is taken of "the limited number of the negotiating States" in connexion with the requirements of acceptance of a reservation by all the parties. However, the Convention does not establish a separate category of "restrictive multilateral treaties" or "multilateral treaties of limited participation". Accord-

[52] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 8.

[53] Para. 4 of the commentary.

[54] See para. 51 above.

[55] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 57.

[56] *Ibid.*, paras. 46-49.

[57] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)* p. 285.

ingly, to establish three categories of multilateral treaties on the lines indicated in the oral comments mentioned above would be a clear departure from the framework of the Vienna Convention.

61. Furthermore, it is not clear that any useful purpose would be served in the field of succession of States in respect of treaties by a general distinction based on the breadth of *participation* in a particular treaty. There may be value in drawing a distinction on some other ground, such as the law-making character of the treaty. This, however, is a question that calls for consideration in relation to the individual draft articles. Meanwhile, the Special Rapporteur does not propose the addition for the purpose of the draft articles of a separate category of multilateral treaties called "general multilateral treaties".

3. Arrangement of the draft articles

Comments of Governments

Oral comments

62. According to the 1972 report of the Sixth Committee the point was made that the distinction between "newly independent States" and States resulting from the separation of part of an existing State, the uniting of two or more States or the dissolution of a State was artificial. One category, it was said, would have sufficed, that of "new State", which would have made it possible to simplify the draft. The view was also expressed that the Commission should have avoided the use of extra-judicial concepts or terms. For instance, it was difficult to see what compelling technical reasons had led the Commission to distinguish between what it termed "newly independent States" and States "emerging from the separation of a State", particularly in view of the fact that it had finally adopted identical solutions for both cases.[58]

Written comments

63. *Austria.* The Austrian Government agreed with the general outline as well as the basic content of the draft articles.

Denmark. The Danish Government expressed the opinion that the attempt at codification of the topic on State succession in respect of treaties was generally acceptable with respect not only to the structuring and delimitation of the draft but also to the individual articles.

Poland. In the opinion of the Government of the Polish People's Republic, the draft articles correctly take into account the specific characteristics of the various types of succession of States.

Observations and proposals of the Special Rapporteur

64. The comments mentioned in the two preceding paragraphs of the present report are by no means exhaustive and overlap with comments made on the draft as a whole and on the scheme of the draft articles. In fact, there has been a large measure of approval of the draft articles and, either expressly or by implication, of the scheme adopted by the Commission. Apart from the implicit criticism of the arrangement of the draft articles, the oral comments mentioned above raise two specific points—one of terminology and one of substance. The point of terminology, relating in particular to the expression "newly independent State", criticizes the Commission for using "extra-judicial" concepts or terms. While observing that in treaty-drafting it is sometimes necessary to find new terms to meet new situations, the Special Rapporteur considers that the question of terminology is one to be kept under review throughout the process of drafting and, at the present stage, he has no proposal for a substitute for the expression "newly independent State".

65. The point of substance relates to what is said to be the identity of solution as between "newly independent States" (Part III of the draft) and "separation of part of a State" (article 28). As the Special Rapporteur reads the draft articles, however, there are certain relevant distinctions. Paragraph 1 of article 28 clarifies the position of the State itself where part of its territory becomes a State by separation. Also the cases themselves are different because in essence Part III of the draft articles is concerned with new States that were formerly *dependent* territories, whereas article 28 is concerned with new States which were formerly an *integral part* of the territory of a State. Therefore, during the process of drafting, it seems to be advisable to deal with the two cases separately even if in the end it is found that the relevant solutions are identical in both cases and that the provisions can be united. Accordingly, the Special Rapporteur proposes that this point also should be borne in mind and given consideration at a later stage in the Commission's deliberations at its twenty-sixth session.

I. Recognition and succession of States

Comments of Governments

Oral comments

66. No oral comments were made.

Written comments

67. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic noted that the draft articles did not touch upon the question of the relation between recognition and succession of States. The Government commented, however, that, inasmuch as a refusal of recognition may be used for the purpose of preventing the successor State from making use of the rights ensuing in respect of that State from succession, it would be useful to specify in the draft that succession in respect of multilateral international treaties under conditions contained in the draft articles exists irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question.

German Democratic Republic. The Government of the German Democratic Republic also noted that the draft articles did not refer to the relationship between recognition and State succession. Its position was that the absence

[58] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 55.

of recognition of a successor State must not result in that State being prevented from or hindered in exercising the rights and obligations ensuing from succession. Apart from succession in respect of bilateral treaties, which can hardly be realized without mutual recognition, the Government of the German Democratic Republic deemed it necessary to include in the draft articles a provision making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. This would also take account of the generally recognized principle of international law that the international personality of a State exists independently of its recognition. In the opinion of the Government of the German Democratic Republic, a formula patterned on article 74 of the Vienna Convention could be adequate for this purpose.

Observations and proposals of the Special Rapporteur

68. As indicated above, the Special Rapporteur has found no comments made by delegations in the Sixth Committee at the twenty-seventh or twenty-eighth sessions of the General Assembly on the question of the relation between recognition and succession of States in respect of treaties. The written comments of the Governments of Czechoslovakia and the German Democratic Republic are the only comments of Governments that raise this question. Such limited interest in the question, however, would not in itself be sufficient reason to justify the Commission in declining to include provisions on recognition in the draft articles. On the other hand, the history of the topic of recognition of States and Governments indicates that the Commission would be unwise to embark on a discussion of the question at the present stage of its work on the draft articles on succession in respect of treaties.

69. It is indeed true that the draft articles do not deal with the question of recognition; but neither did the draft articles on the law of treaties prepared by the Commission at its eighteenth session [59] nor did the Vienna Convention. The silence of the Vienna Convention on the question of recognition again would not in itself be conclusive, but it is a reason for proceeding with great caution. There would be serious risks involved in broaching such a delicate and complex question in the general context of international law relating to treaties when previously it has been considered wiser not to do so.

70. The delicate and complex character of the question is confirmed by the history of the topic in the Commission itself. This is summarized in the "Survey of international law".[60] Having recalled "the widely held view that questions of recognition pertain to the province of politics rather than the law", the "Survey" said that, in 1949, the Commission had placed the item "Recognition of States and Governments" on the list of subjects for study and, although reference was made to the political aspects of the question, the general opinion was that, in view of its undoubted importance, an attempt should be made to codify it. Since 1949, the Commission has referred to the subject of the recognition of States and Governments in several of its drafts, but has not entered into an extensive examination of the question. It is worth examining the paragraph of the observations concerning the draft Declaration on Rights and Duties of States adopted by the Commission at its first session in 1949 which is quoted in the "Survey". According to the passage quoted there, in connexion with a proposed article (which was not adopted by the Commission) some members took the view that, even before its recognition by other States, a State has certain rights in international law; on the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States.[61]

> The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.[62]

71. The "Survey" then refers to a paragraph of the commentary to article 60 (Severance of diplomatic relations) of the final draft articles on the law of treaties adopted by the Commission in 1966. The paragraph stated:

> ... any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments ... or recognition of States and Governments ....[63]

It should be noted here that this statement spoke of recognition of a Government and not recognition of a State. The latter was not in fact treated as falling within the scope of article 60 or any other article of the draft on the law of treaties.

72. Paragraph 2 of article 7 of the draft articles on special missions adopted by the Commission in 1967, which stated: "A State may send a special mission to a State, or receive one from a State which it does not recognize",[64] was deleted by the Sixth Committee, and the Convention on Special Missions adopted by the General Assembly on 8 December 1969 does not refer to the existence or absence of recognition on the part of the States concerned.[65] In 1969, the Commission, in connexion with the topic "Relations between States and international organizations" decided to postpone for consideration at a future session the possible effects of various exceptional situations, such as absence of recognition, on the representation of States in international organizations because

[59] *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II,C.

[60] Working paper prepared in 1971 by the Secretary-General. For the summary, see *Yearbook ... 1971*, vol. II (Part Two), pp. 16-18, document A/CN.4/245, paras. 55-66.

[61] The proposed article would have read " Each State has the right to have its existence recognized by other States ".

[62] *Yearbook ... 1949*, p. 289, document A/925, para. 50.

[63] *Yearbook ... 1966*, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II, para. 1 of the commentary to article 60.

[64] *Yearbook ... 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II,D.

[65] General Assembly resolution 2530 (XXIV), annex.

of "the delicate and complex nature of the questions concerned".[66]

73. The two concluding paragraphs of the relevant section of the "Survey" contain a general summary of the position and merit special consideration. They are too long to be quoted in full in the present report, but it may be convenient to quote some of the more important sentences. In the first it is stated:

> Although steps have been taken (for example, the inclusion of the topic on the Commission's long-term programme in 1949) towards codifying the topic so as to make its legal parameters more distinct, there has been a persistent current of opinion which has considered that since what was involved was a matter of discretion, lying in the hands of individual governments, there was, in effect, nothing to codify except this basic freedom of choice.... An effort to codify the topic would thus have, at the outset, to consider the major issue of whether or not the exercise of recognition is to remain essentially a matter lying wholly or largely in the hands of individual States and governments.[67]

74. In the following paragraph of the Survey, it is stated:

> When aspects of the question of the effects of non-recognition have arisen in connexion with the Commission's work in various spheres (for example, with respect to the preparation of the draft articles on the law of treaties and in connexion with the topic of "Relations between States and international organizations"), the Commission has had difficulty in dealing with the question in isolation and has tended to set it aside until such time as it might decide to study the topic on a wider basis. It is possible, therefore, that by distinguishing the role of recognition in terms of the political relations between States on the one hand, and its legal requirements and consequences in various spheres on the other, consideration might be given to examining aspects listed above, not just in a single context, but more widely, with a view to its possible codification as a distinct legal institution or procedure, albeit one which is part of a larger whole.[68]

75. Enthusiasm for codification of the topic of recognition of States and Governments does not seem to be increasing. In the report of the Commission on the work of its twenty-fifth session, it was included among "other topics on which one or more members thought that the Commission might envisage undertaking work" and not among the topics "repeatedly mentioned" by members.[69] According to the 1973 report of the Sixth Committee, this topic was not among those mentioned by delegations for inclusion in the Commission's programme of work.[70]

76. In view of this history of reluctance to embark on the question of recognition of States, especially in a piecemeal manner, and of the delicacy and complexity of the topic, the Special Rapporteur would be reluctant to propose that the Commission should introduce any elements of the topic of recognition into the draft articles on succession of States in respect of treaties. Any reference to the effects of recognition or non-recognition of States would inevitably raise controversial issues about the character and effects of recognition in international law in general and with respect to the law of treaties in particular. Even a purely negative formula of the kind suggested by the Government of Czechoslovakia,[71] by stating that succession in respect of multilateral treaties exists "irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question", would itself raise the question of the effect of recognition or non-recognition of a State on its participation in multilateral treaties. While such questions are, of course, relevant, it was considered wiser not to deal with them in the context of the draft articles on the law of treaties, and, in the view of the Special Rapporteur, it would be wiser not to try to deal with them in the context of succession of States in respect of treaties.

77. The basic difficulty of the subject is underlined by the assumption in the written comments of the Government of the German Democratic Republic [72] that there is a "generally recognized principle of international law that the international personality of a State exists independently of its recognition". It is well known that there are differences of doctrine on the need for and possible obligation to recognize a new State. Moreover, even if the "principle of international law" were generally accepted in the form stated it would not in itself automatically lead to the right of participation by the new State in a multilateral treaty irrespective of recognition by the States parties to the treaty. For the reasons already indicated in the foregoing paragraphs, it is not considered advisable for the Commission to become involved in such delicate and complex questions at this stage of its work. Therefore, the Special Rapporteur has refrained from troubling the Commission with any attempt at an exposition of the various doctrinal views.

78. It remains to consider the specific suggestion made by the Government of the German Democratic Republic that a formula patterned on article 74 of the Vienna Convention could be adequate for the purpose of making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. Apart from the general objection that such a proposition would involve consideration of the effects of recognition and non-recognition, with all its incidental problems, it is not a first sight obvious how article 74 could be adapted to the purpose intended.

79. Article 74 of the Vienna Convention reads:

> The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

The second sentence of the article does not appear to have any relevance to the intentions of the Government of the German Democratic Republic. It appropriate substitutions were made in the first sentence it would read:

> The presence or absence of recognition between two or more States does not prevent a succession of States in respect of treaties between those States.

[66] *Yearbook . . .1971*, vol. II (Part Two), p. 17, document A/CN.4/245, para. 63.

[67] *Ibid.*, pp. 17-18, document A/CN.4/245, para. 65

[68] *Ibid.*, p. 18, document A/CN.4/245, para. 66.

[69] *Yearbook . . . 1973*, vol. II, p. 230, document A/9010/Rev.1, para. 173.

[70] *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, para. 109.

[71] See para. 67 above.

[72] *Ibid.*

No doubt a more elegant formula could be devised, but the transposition does bring out the point that the cases of diplomatic and consular relations on the one hand and of recognition on the other are of a different character and that a formula applicable in the former is not necessarily applicable in the latter. This seems to the Special Rapporteur to be so as regards article 74 of the Vienna Convention. Further adaptation of the formula would, of course, be possible but it would tend to approximate to the suggestion of the Government of Czechoslovakia, with the attendant objections already mentioned.

80. Accordingly, having regard to the above general considerations and the difficulties involved in the specific suggestions made by the two Governments which have submitted written comments, the Special Rapporteur proposes that the Commission should decline to embark on particular aspects of the question of recognition of States in the context of the present draft articles, but should state in its report that, for reasons such as those mentioned in the foregoing paragraphs, it was decided to leave them for future consideration in a broader context. In any event, since the draft articles are only intended to apply to the effects of a succession of States occurring in conformity with international law, it is anticipated that cases involving non-recognition and falling within the draft articles are likely to be comparatively rare.

J. Interrelation between the present draft articles and the draft articles on succession of States in respect of matters other than treaties

Comments of Governments

Oral comments

81. No comments on the interrelation between the two sets of draft articles on succession of States appear to have been made at the twenty-seventh session of the General Assembly. The point was, however, mentioned by a number of delegations in the Sixth Committee at the twenty-eighth session. The relevant comments, as they appear in the summary records, are set out below in chronological order.

82. *United States of America.* The United States delegation welcomed the decision of the Commission, in dealing with the topic of succession of States in respect of matters other than treaties, to adopt as a working method a substantial degree of parallelism with the general principles incorporated in the draft articles on succession of States in respect of treaties. Although it might be necessary, as work on that topic developed, to depart from that working method, there was a sufficient relationship between the two subjects to permit the use of certain common definitions and general principles.[73]

Finland. The Finnish delegation noted that several provisions in the draft articles on succession of States in respect of matters other than treaties, adopted provisionally by the Commission in 1973, were based on the corresponding articles on succession of States in respect of treaties adopted by the Commission on first reading in 1972. The delegation mentioned in particular articles 2 and 3 of the former.[74]

Kenya. The delegation of Kenya said that when the Commission had completed its work on all the draft articles on succession of States in respect of matters other than treaties, it might seriously consider amalgamating the drafts on that topic, on succession of States in respect of treaties and succession of States in respect of membership of international organizations, in order to avoid the inevitable duplication which would occur if the three subjects were dealt with separately. It would then, the delegation said, be necessary only to supplement article 3, "Use of terms" accordingly.[75]

Brazil. The Brazilian delegation, noting considerable progress by the Commission on succession of States in respect of matters other than treaties, said that the Commission had decided to align the subject, as far as possible, with the work already accomplished on succession of States in respect of treaties. In the two sets of draft articles there were provisions that corresponded with one another. Indeed, the two subjects had common roots in a situation arising out of the replacement of one State by another in the exercise of responsibility for the international relations of the territory. Articles 1 and 2 of the draft articles on succession of States in respect of matters other than treaties thus paralleled articles 1 and 6 respectively of the draft on succession in respect of treaties.[76]

Israel. The delegation of Israel observed that many of the articles on the law of treaties, including succession of States in respect of treaties, were properly couched as residual rules, thus giving effect to the leading principle of the autonomy of the will of the parties as one of the corner-stones of the law of treaties, especially in its procedural aspect. However, with regard to the substantive law of succession in respect of matters other than treaties, and bearing in mind the temporal element, the question had to be considered whether a series of draft articles of a pronounced residual character would constitute an appropriate exposition of the law, whether proposed as codification or as progressive development.[77]

Bulgaria. The Bulgarian delegation commented, with reference to the succession of States in respect of matters other than treaties, that the Commission had prepared an introduction consisting of three articles which contained the provisions applying to the draft as a whole and it had wisely related the draft to succession of States in respect of treaties.[78]

United Republic of Tanzania. The delegation of the United Republic of Tanzania said that the question of succession of States in respect of matters other than

[73] *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee,* 1398th meeting, para. 5.

[74] *Ibid.,* 1399th meeting, para. 36.

[75] *Ibid.,* 1401st meeting, para. 12.

[76] *Ibid.,* paras. 53 and 56.

[77] *Ibid.,* 1404th meeting, para. 12.

[78] *Ibid.,* 1405th meeting, para. 27.

treaties was very closely related to that of succession of States in respect of treaties. In both cases, it was a matter of determining the rights and duties of newly independent States.[79]

Turkey. The Turkish delegation agreed with the Commission that the criterion for delimitation between the topic of succession of States in respect of matters other than treaties and the topic of succession in respect of treaties should be "the subject-matter of succession", i.e., the content of the succession and not its form.[80]

Written comments

83. *Czechoslovakia.* The Government of the Czechoslovak Socialist Republic wished to note that, quite naturally, there was a close connexion between the problems involved in the succession of States in respect of treaties and the other questions of succession of States, and that, therefore, in elaborating on individual problems of the succession of States, it was necessary to proceed consistently from the same principles and to respect the necessity for a balanced relationship between individual cases of succession.

German Democratic Republic. The Government of the German Democratic Republic deemed it necessary to underline the close interrelation which no doubt existed between succession in respect of treaties and succession in respect of matters other than treaties. Proceeding from the fact that succession of States is a homogeneous institution of international law, the Government of the German Democratic Republic expressed itself in favour of a single convention comprising both aspects of State succession; but in case separate regulations were to be adopted, at least uniform principles should be established in their texts.

Observations and proposals of the Special Rapporteur

84. Only the oral comments of Kenya and the written comments of the German Democratic Republic have suggested that the draft articles on succession of States in respect of treaties and the draft articles on succession of States in respect of matters other than treaties should be combined in a single convention. Their reasons are somewhat different. The purpose of the former is "to avoid... inevitable duplication", while the latter relies on "the fact that succession of States is a homogeneous institution of international law". Both, however, would involve at least a partial reversal of the decision to treat the two aspects of the topic of succession of States separately and to give priority to the completion of the draft articles on succession of States in respect of treaties. Of course, it is desirable to avoid duplication where possible, but repetition in the interests of uniformity and consistency may be desirable. This was the view taken by the Commission in the draft articles on succession of States in respect of matters other than treaties prepared at its twenty-fifth session.[81] That view appears to have been shared by most Governments so far as their views can be gleaned from the comments that have been made. However, the fact that there may be repetition in the interests of uniformity and consistency does not in itself lead to the conclusion that all the articles should be combined in a single convention.

85. On the other hand, if it were true that "succession of States is a homogeneous institution of international law", this would be a strong argument in favour of the abandonment of the plan to draft separate sets of draft articles for different aspects of the topic and of the completion of a single set to be embodied in a single convention. As the work of the Commission has developed, however, it has become clear that, while there are certain elements in common between the various aspects, there are material differences that justify different treatment. For example, the view that

> The task of codifying the law relating to succession of States in respect of treaties appears, in the light of State practice, to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than *vice versa*,[82]

does not apply to other aspects such as succession of States in respect of State property. For the purposes of codification of the law relating to those aspects the provisions of the Vienna Convention could not be taken "as an essential framework".[83] The rules to be codified are likely to be different from, rather than homogeneous with, those to be codified in relation to succession of States in respect of treaties. Though there are undoubtedly common elements in the various aspects of the law relating to succession of States, there are such divergencies that the Commission could not safely proceed on the basis of the theory that "succession of States is a homogeneous institution of international law".

86. From the practical point of view also, it would be unwise at the present stage to aim at a single convention or even the ultimate unification of the sets of draft articles. The present task of the Commission is to complete the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session. Work on other aspects is not sufficiently advanced to enable any but the most limited account to be taken of the rules that will eventually be codified with respect to them, and attempts at speculation in the interests of ultimate unification would be likely to cause undue delay in the current work of the Commission.

87. On the other hand, it should be noted that most of the comments approved expressly or by implication some degree of parallelism between the two sets of draft articles and, in particular, so far as possible the use of common definitions and common basic principles. In the view of the Special Rapporteur, the Commission should constantly bear this objective in mind in completing the draft articles on succession of States in respect of treaties, so far as it can do so without distorting or unnecessarily hindering its work. Nevertheless, at the present stage,

[79] *Ibid.*, para. 31.

[80] *Ibid.*, 1406th meeting, para. 4.

[81] *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, chap. III, sect. B.

[82] *Yearbook... 1972*, vol. II, p. 226. document A/8710/Rev.1, para. 32. See also paras. 21-23 above.

[83] *Ibid.*

the governing consideration in adopting any particular form of words should be what is best in the context of the law relating to succession in respect of treaties.

K. General approval or disapproval

Comments of Governments

Oral comments

88. In the Sixth Committee at the twenty-seventh session of the General Assembly, many delegations commended the members of the Commission, and in particular the Special Rapporteur, Sir Humphrey Waldock, for their contribution to the preparation of a draft which was referred to as an impressive piece of scholarly study, masterly work and legal expertise. The excellence of the comprehensive commentaries analysing the reasons and legal principles underlying each article was also stressed. Several representatives stated that the draft articles were a good and solid basis for continued work on the topic of succession of States in respect of treaties and seemed likely to prove acceptable to the entire international community. The draft was the more remarkable because the task of codification was particularly difficult in a field where there was no general doctrine and State practice and custom had not yet produced well established and consistent precedents. The draft articles marked the meeting-point of certain diverse legal opinions and tendencies. That fact had naturally determined the codification working methods followed by the Commission and the draft, which contained elements of codification as well as of progressive development, intended to lay down practicable and detailed provisions which would introduce uniformity and clearness in the sparse present rules, develop them and fill the existing lacunae, taking into consideration the interests of the States as well as those of the international community.[84]

89. Notwithstanding this generally favourable reaction, some representatives criticized certain aspects of the conclusions reached by the Commission in connexion with matters related mainly to the clean slate principle as a basic general rule for newly independent States, to the recognized exceptions to that principle, and to the scope and scheme of the draft. Other representatives singled out a certain number of questions for further study with a view to improving the draft.[85]

Written comments

90. *Austria.* The Austrian Federal Government stated that the provisional draft articles adopted by the Commission represented basically a system which had, *inter alia*, already been propounded by Austrian jurists. Austria therefore entirely agreed with the general outline as well as the basic content of those draft articles.

Czechoslovakia. The Government of the Czechoslovak Socialist Republic stated that the submitted draft of the articles on succession of States in respect of treaties, prepared by the Commission, reflected current international practice, proceeded from the requirements of newly established States and was in harmony with the fundamental principles of current international law, particularly with the principles of sovereign equality of States and self-determination of nations. Therefore, the draft could, in substance, be regarded as a good foundation for a future codification of the questions involved.

Denmark. The Danish Government was of the opinion that the present attempt at codification of the topic of State succession in respect of treaties was generally acceptable with respect not only to the structuring and delimitation of the draft, but also to the individual articles.

German Democratic Republic. The Government of the German Democratic Republic welcomed the provisional draft articles on succession of States in respect of treaties presented by the Commission and, in general, considered them to be a suitable basis for a future codification of the questions of succession of States.

Poland. The Government of the Polish People's Republic welcomed with great satisfaction the text of the draft articles on succession of States in respect of treaties produced by the Commission. The Government was of the opinion that the draft articles correctly took into account the specific characteristics of the various types of succession of States.

Sweden. The Swedish Government commented that the draft articles on succession of States in respect of treaties and the commentaries pertaining thereto constituted a most valuable contribution to the study of a difficult and vital problem in international law and organization.

Syrian Arab Republic. The Government of the Syrian Arab Republic stated that it was in general agreement with the provisional draft articles on succession of States in respect of treaties.

United Kingdom. The United Kingdom Government stated that the provisional draft articles on succession of States in respect of treaties, adopted by the Commission in 1972, were a useful basis for further work on this topic.

United States of America. The Government of the United States considered that the provisional draft articles on succession of States in respect of treaties constituted a sound basis for consideration of this difficult topic. The Government commented that the difficulties inherent in preserving a proper balance between the objectives of preserving continuity in international relationships on the one hand while on the other taking account of the necessities of an emergent State, had, to a large extent, been met in the draft articles.

91. Apart from the above comments by Governments, there were also written comments from the Governments of the Somali Democratic Republic and of Tonga.[86] However, the comments of each of these two Governments were directed to particular aspects of the topic of special interest to that Government, and they did not

[84] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 24-26.

[85] *Ibid.*, para. 27. With reference to the clean slate principle, the scope and the scheme of the draft, see respectively paras. 24-30, 42-48 and 49-65 above.

[86] See foot-note 9.

include any general expression of approval or disapproval of the provisional draft articles.

Observations and proposals of the Special Rapporteur

92. At the risk of some overlapping with other parts of the present report, the general views of Governments on the draft articles as a whole have been set out at some length because they demonstrate a remarkable degree of unanimity in their broad approval of the draft. This in no way disminishes the significance of the criticisms or the depth of penetration of some of them. On the contrary, only the Government of the Syrian Arab Republic has contented itself with an expression of general agreement. In most cases, general approval has been accompanied by criticisms and suggestions—some of a far-reaching character. Nevertheless, the favourable attitude of most Governments that have commented provides the Special Rapporteur with a guiding principle in approaching the task of considering the individual articles of the draft. The guiding principle is that he should adhere to the basic scope and main substance of the draft articles and seek to improve the draft rather than to introduce radical alterations. The Special Rapporteur would also propose that the Commission should be guided by the same principle in its second reading of the draft articles.

III. Observations on the specific provisions of the draft articles

PRELIMINARY OBSERVATIONS OF THE SPECIAL RAPPORTEUR

93. Several of the comments already covered in section II of the present report, while related to the draft articles as a whole, also relate to one or more specific articles. In general, such comments are not repeated in section III, but reference is made to them with respect to each article. Otherwise, the pattern of stating the oral comments of delegations to the General Assembly and the written comments of Governments has been followed, but the comments of delegations are given individually on the basis of the records of the Sixth Committee and the General Assembly in the order in which the statements were made.

94. The observations that follow are based on two assumptions. The first is that, in accordance with the normal practice of the Commission, the final draft of the definitions will be settled after the revision of the other draft articles has been completed. In this sense, the observations and proposals of the Special Rapporteur on the definitions should be regarded as provisional. The second is that the arrangement of the draft articles will be re-examined after the revision of all the draft articles, and that any consequential amendments that may be required will be made at that stage. On this understanding, the present order and numbering of the draft articles will be used in this section of the present report, which is based on the text of the draft articles and commentaries in the report of the International Law Commission to the General Assembly on the work of its twenty-fourth session.[87]

[87] See above, foot-note 1.

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

Comments of Governments

Oral comments

95. *Pakistan.* The Pakistan delegation, as an example or minor failings in the language of the draft articles, pointed out that article 1 referred to "treaties" without qualifying the expression, although it had later been defined in article 2, paragraph 1 (*a*), with two limiting qualifications. The delegation therefore suggested that the insertion of the word "certain" before the word "treaties" might be appropriate.[88]

Observations and proposals of the Special Rapporteur

96. The Pakistan comment is the only one to make any suggestion about the wording of article 1. The comment relates to the expression "treaties between States" and the definition of the term "treaty" which are taken verbatim from article 1 and article 2, paragraph 1 (*a*) of the Vienna Convention. The insertion of the word "certain" in article 1 would be a departure from the wording used in the Vienna Convention. In the absence of any substantive reason for such a departure, the Special Rapporteur proposes that the present text of article 1 be retained.

97. Reference should be made here to the suggestion that the scope of the draft articles should be extended to include cases of succession resulting from the participation of States in certain hybrid unions, like customs unions and common markets.[89] If, contrary to the view of the Special Rapporteur, the Commission should decide that it would be appropriate to accede to that suggestion, it would be necessary to amend article 1 so as to extend its scope to such unions and common markets. On the other hand, if the Commission accepts the view of the Special Rapporteur, the point would appear to be adequately covered by the commentary to article 1 which says

> the article is designed to exclude both "succession of governments" and "succession of other subjects of international law", notably international organizations, from the scope of the present articles.[90]

98. The Commission might, however, consider inserting at this point in the commentary a sentence, based on the suggestion of the Bulgarian delegation, to the effect that the Commission had also excluded from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution.[91]

[88] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1325th meeting, para. 20.

[89] See paras. 42-48 above.

[90] Para. 4 of the commentary.

[91] See paras. 50-57 above.

Article 2. Use of terms

PARAGRAPH 1 (*a*)

Comments of Governments

Oral comments

99. *Cuba.* The Cuban delegation said that it should be made explicit in the definition of the term "treaty" that it meant a validly concluded international agreement.[92]

Ukrainian SSR. The Ukrainian delegation said that the provisions defining the scope of the draft articles were on the whole correctly formulated and that they ensured regulation of succession in respect of treaties concluded in accordance with the principles of international law.[93]

Pakistan. The Pakistan delegation said that the scope of the draft articles was limited with regard to both the categories of treaties and the parties to them, and that the limitations were brought out in the definition of the word "treaty". Nevertheless, said the delegation, that limitation had not reduced their value but had enabled the Commission to be thorough and far-sighted within the limit set. No effort had been spared to make the articles consistent with the Vienna Convention.[94]

Written comments

100. There were no written comments.

Observations and proposals of the Special Rapporteur

101. In effect, the comments of the delegations of Pakistan and the Ukrainian SSR uphold the text of the definition of the term "treaty" as it is in the draft article. The Cuban delegation, however, suggested that the definition should provide explicitly that the term meant "a validly concluded international agreement". Such an amendment would be a departure from the definition of the term "treaty" in article 2, paragraph 1 (*a*), of the Vienna Convention, with which the definition in the draft article is at present identical. In the view of the Special Rapporteur, such a departure from the corresponding text in the Vienna Convention is unnecessary and undesirable. Accordingly, it is proposed that the text be retained as drafted.

PARAGRAPH 1 (*b*)

Comments of Governments

Oral comments

Poland. The Polish delegation said that the starting-point of the draft articles was very clear, namely, the definition of the expression "succession of States", which denoted simply the replacement of one State by another in the responsibility for the international relations of a territory, thus excluding all questions of rights and obligations as a legal incident of that substitution.[95]

Spain. The Spanish delegation approved in principle the fundamental options which had been adopted including the one by which the concept "succession of States" meant the replacement of one State by another in the responsibility for the international relations of a territory.[96]

Cuba. The Cuban delegation did not feel that the words "in the responsibility for the international relations of territory" in the definition of the term "succession of States" were a particularly felicitous choise. The word "responsibility" had a very specific meaning in the law of contracts and obligations and it was not a question of international relations of territory but of international relations of sovereignty in respect of a particular territory; moreover, there was a transfer not only of responsibilities but also of rights and obligations. The delegation also thought that account should be taken of the fact that every territory had a population, whose prerogative it was to exercise its inalienable right to self-determination and to decide whether or not it was prepared to assume the responsibility deriving from earlier treaty relations.[97]

El Salvador. The delegation of El Salvador said that succession of States in respect of treaties involved both the replacement of one State by another as regards responsibility for the international relations of a particular territory and the transmission of the treaty rights and obligations.[98]

Ukrainian SSR. The Ukrainian delegation said that the Commission had been successful in defining the term "succession of States" in such a way that it could be applied not only to succession of States in respect of treaties but to succession in general.[99]

Union of Soviet Socialist Republics. The delegation of the USSR commented that the draft articles used a good deal of the terminology already contained in the Vienna Convention and that, of the new terms employed, "succession of States" was interesting in that it applied to succession of States generally and not just to succession in respect of treaties.[100]

Turkey. The Turkish delegation observed that the word "*responsabilité*" had a more precise meaning in French legal language than the word "responsibility" in English usage, and added that, although paragraph 4 of the commentary explained that it was not intended to convey any notion of "State responsibility", it would have been wiser to avoid the use of the term, particularly as the Commission was preparing draft articles on State responsibility.[101]

[92] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1322nd meeting, para. 5.

[93] *Ibid.*, 1323rd meeting, para. 49.

[94] *Ibid.*, 1325th meeting, para. 19.

[95] *Ibid.*, 1320th meeting, para. 16.

[96] *Ibid.*, para. 23.

[97] *Ibid.*, 1322nd meeting, para. 6.

[98] *Ibid.*, 1323rd meeting, para. 10.

[99] *Ibid.*, para. 49.

[100] *Ibid.*, 1324th meeting, para. 33.

[101] *Ibid.*, 1325th meeting, para. 3.

Pakistan. The Pakistan delegation said that the words "one State by another" created the impression that one whole State was to be replaced by another and suggested the inclusion of "whole or part" of a territory was likely to be conducive to greater accuracy.[102]

Brazil. The Brazilian delegation said that the draft articles on succession of States in respect of matters other than treaties contained provisions which corresponded to the provisions contained in the draft articles on succession in respect of treaties. Indeed, the two subjects had common roots in a situation arising out of the replacement of one State by another in the exercise of responsibility for the international relations of the territory.[103]

Written comments

103. *Sweden.* The Swedish Government commented that "responsibility" in the context of the definition of "succession of States" obviously meant something else than "State responsibility" in the technical sense, and that it was not evident what it did mean. In any case, the term was not clear enough to form part of a definition. Equally vague and obscure was the expression "international relations of territory". Did it imply that "territory" already was a subject of international law having relations to States governed by that law, such as treaty relations? If so, what became of the clean slate theory? If not what kind of international relations was meant. It seemed preferable to return to the expression earlier used by the (former) Special Rapporteur, namely "the replacement of one State by another in the sovereignty of territory". It that expression was considered too limited, because of the word "sovereignty", the term "administration" might be added, so that paragraph 1 (*b*) might read:

> "Succession of States" means that the sovereignty over or administration of a territory passes from one State to another.

United Kingdom. The United Kingdom Government commented as follows. Whilst the phrase "in the responsibility for the international relations of territory" had been used in State practice, the draft definition was not altogether satisfactory. Quite apart from the possibility of confusion with the notion of "State responsibility", the meaning of the phrase was not entirely free from doubt in all cases and it could give rise to difficulties, e.g., as regards protected States. A possible improvement to get over the latter difficulty would be to add the words "previously forming the territory or part of the territory of the first State". However, the first alternative in the commentary ("in the sovereignty in respect of territory")[104] might be preferable. A consequential amendment would then be necessary to article 2, paragraph 1 (*e*).

Tonga. The Government of Tonga failed to find anything in the draft articles relating to the case of Protected States and therefore wished to recall that it was a Protected State from 1900, when the Treaty of Friendship with Great Britain was entered into, until 1970 when it was abrogated by mutual consent. According to the comments of the Government of Tonga, the effect of the Treaty of Friendship was that Great Britain acted in "a representational capacity on behalf of the Kingdom of Tonga in the making of treaties". For this reason, the treaties which the Kingdom of Tonga had entered into before 1900 remained in force; and the treaties which Great Britain made on its own behalf were also made on behalf of the Kingdom of Tonga, which was consulted with respect to them. Upon the abrogation of the Treaty of Friendship, the Kingdom of Tonga terminated the grant of representational capacity in treaty making which it had made to Great Britain, and by re-entering the community of nations resumed the power to enter into treaties directly. The consequence of this was that all treaties which Great Britain had made validly on behalf of the Kingdom of Tonga now became the responsibility of the Government of Tonga, and the United Kingdom ceased to have such responsibility under these treaties except in its own territories. Should Great Britain have acted *ultra vires* in entering into treaties these would have been void, and this would not be a question for the law of State succession. After discussing the implications of the clean slate doctrine in the context of draft article 11, the Government of Tonga added the comment that other parties to Tonga's treaties have accepted that relationships have been unaffected by the abrogation of the Treaty of Friendship, and it believed that its own experience was a better guide to the contemporary legal position than the old cases of the independence of Belgium or Panama which were cited by the Commission.[105]

Observations and proposals of the Special Rapporteur

104. The definition of the term "succession of States" is not only the basis of the definitions that follow but is also the key to the draft articles as a whole. Therefore, it is particularly important that the definition should be as clear and precise as possible. It is apparent that, during its twenty-fourth session, the Commission devoted much care and skill to the drafting of the definition. At the twenty-seventh session of the General Assembly, the definition was expressly approved by the delegations of Poland, Spain and El Salvador and, at least implicitly by the delegations of Iraq, the Soviet Union and the Ukrainian SSR. At the twenty-eighth session of the General Assembly, the definition was also cited with approval by the Brazilian delegation. On the basis of this evidence, it cannot, however, safely be said that the draft definition has the support of a substantial majority of Members of the United Nations. Moreover, the wording of the definition has been criticized by the delegations of Cuba, Turkey and Pakistan and in the written comments of two Member States, Sweden and the United Kingdom. Criticism of the definition may also be implicit in the comments of the Government of the Kingdom of Tonga, whose views should be considered on their merits, even though Tonga is not a Member of the United Nations. The comments of Tonga, however,

[102] *Ibid.*, para. 21.

[103] *Ibid., Twenty-eighth Session, Sixth Committee,* 1401st meeting, para. 56.

[104] Para. 4 of the commentary.

[105] ILC (XXV)/Misc.2, paras. 3, 5, 7 and 15.

raise a point of substance rather than of drafting, and will be considered below after the text of the definition has been re-examined in the light of the other comments.

105. In effect, there are three criticisms of the draft definition of "succession of States". First, Cuba, Turkey, Sweden and the United Kingdom criticize the use of the word "responsibility". Secondly, Cuba, Sweden and the United Kingdom would prefer the use of the concept of "sovereignty" instead of "international relations" for the purposes of the definition. Thirdly, the Pakistan delegation suggested the inclusion of "whole or part" of a territory to avoid the impression that one whole State was to be replaced by another. In the light of its criticisms, the Swedish Government suggested that paragraph 1 (*b*) might read:

"Succession of States" means that the sovereignty over or administration of a territory passes from one State to another.

106. Before considering the three criticisms, it should be noted that the definition suggested by the Swedish Government goes further in its alteration of the draft than is required by the Government's specific comments. It changes the form of the definition and departs from the idea of the fact of replacement which is an essential characteristic of the Commission's text. In the view of the Special Rapporteur, this change alone would make the suggested definition unsatisfactory. This does not, however, in itself answer the criticisms that have been made.

107. As regards the first two criticisms mentioned above, it is useful to recall the history of the matter in the Commission. In his first report on succession of States and Governments, Sir Humphrey Waldock, the Special Rapporteur, proposed the following definition for the purposes of the draft articles:

"Succession" means the replacement of one State by another or, as the case may be, of one Government by another, in the possession of the competence to conclude treaties with respect to a given territory.[106]

During the consideration of that report at the twentieth session of the Commission, some members gave support to the use of the idea of change in the possession of "competence" to conclude treaties with respect to a given territory. Certain members thought that the use of the term "competence" instead of "sovereignty" would have the advantage that the definition would cover a greater number of international situations such as international mandates, territories under trusteeship and protectorates. Other members preferred the term "sovereignty" as it would exclude certain situations; for instance, those arising from a military occupation. The Commission, however, decided that, for the time being, there was no need to attempt to draw up a general definition of State succession.[107]

108. In his second report on succession in respect of treaties, Sir Humphrey Waldock proposed that "succession" should mean "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory". Sir Humphrey Waldock preferred the wider coverage of the phrase "competence to conclude treaties", but to meet the wishes of those members who preferred a formulation in terms of "sovereignty", he suggested that reference might be made to both cases, change of sovereignty and change of treaty competence.[108] When the draft of article 1 was under consideration at the twenty-fourth session of the Commission, he pointed out that he had retained the idea of replacement of one State by another in the competence to conclude treaties with respect to territory because there existed cases where such a replacement might take place regardless of any change of sovereignty.[109] During the discussion that followed there was criticism of the use of the term "sovereignty" partly on the ground that, in the view of certain members, it did not cover colonial territories. It was also said that the words "replacement . . . in the competence to conclude treaties with respect to territory" were not sufficiently explicit, and that they could not be included in a definition applicable to the draft articles on succession of States in respect of matters other than treaties.[110] On the other hand, there was also support by certain members for the retention of the "sovereignty" formula and even of both formulae.[111] In spite of these differences of view, there was general agreement that a formula on the lines of that which had been put forward in the second report should be retained for the time being for working purposes.[112] Article 1 (use of terms) was referred to the Drafting Committee by the Commission at its 1158th meeting.

109. Later, at its 1173rd meeting, the Commission began the consideration of a draft article 18 (Former protected States, trusteeships and other dependencies) which Sir Humphrey Waldock had tentatively suggested so that problems involved might be examined by the Commission. In the discussion of the proposed article 18, it became clear that members of the Commission were aware of the relevance of the definitions to special cases such as those of mandates, trusteeships, protectorates and protected States. It may be presumed that this awareness, which emerged in the discussion of the proposed article 18, was carried into the Drafting Committee when it considered the draft definitions including the definition of the term "succession of States". At the 1176th meeting of the Commission, draft article 18 submitted by Sir Humphrey Waldock was referred to the Drafting Committee, where it disappeared without trace.

110. At its 1196th meeting, the Commission, considered a number of draft articles proposed by the Drafting Committee including the draft of article 1 (use of terms).

[106] *Yearbook . . . 1968*, vol. II, p. 90, document A/CN.4/202, article 1, para. 2 (*a*).

[107] *Ibid.*, p. 217, document A/7209/Rev.1, paras. 47 and 50.

[108] *Yearbook . . . 1969*, vol. II, pp. 50 and 51, document A/CN.4/214 and Add.1 and 2, chap. II, article 1, para. 1 (*a*) and para. 4 of the commentary.

[109] *Yearbook . . . 1972*, vol. I, p. 31, 1155th meeting, para. 53.

[110] See, for example, the statement by Mr. Ushakov (*ibid.*, p. 33, 1156th meeting, paras. 14-16.)

[111] See, for example, statement by Mr. Ago (*ibid.*, pp. 36-37, 1156th meeting, paras. 63 and 64).

[112] Statement of Sir Humphrey Waldock summing up the discussion (*ibid.*, p. 42, 1158th meeting, para. 4).

This contained the present text of the definition of "succession of States". The references to "sovereignty" and "competence to conclude treaties" had been replaced by "responsibility for the international relations of territory". The only explanation of the new draft offered by the Chairman of the Drafting Committee was that the Committee had been in some doubt as to whether the word "responsibility" should be retained, but had decided that further explanations could be given in the commentary in order to avoid any misunderstanding.[113] The Chairman, speaking as a member of the Commission, asked how the proposed definition related to such cases as Liechtenstein, San Marino and Andorra, where the responsibility for international relations was divided.[114] After a brief discussion, Sir Humphrey Waldock said that a distinction had to be made between the conduct of international relations and responsibility for international relations. He also said that the latter was the best short definition possible.[115] There was no criticism or dissent expressed by any member of the Commission. The clear inference is that the expression "responsibility for the international relations of" met the wishes of those who objected to the use of the term "sovereignty" and was sufficiently wide and flexible to satisfy those who thought that the expression "capacity to conclude treaties" was inadequate.

111. In the opinion of the Special Rapporteur, the expression "responsibility for the international relations" should be considered as a whole. It is the expression as a whole that has been widely used in State practice. Accordingly, the Commission should be very careful before accepting any substitution for the terms "responsibility" or "international relations". It is in the context of the expression as a whole that the word "responsibility" bears its proper meaning in English and in that context it cannot be confused with responsibility in the sense of contractual or tortious liability or with the somewhat special and technical meaning that the word has acquired in the expression "State responsibility". Of course, the use of the same word in different senses should be avoided if possible, but a search has revealed no alternative word that would be satisfactory in the context of the expression "responsibility for the international relations". Words such as "trust", "charge", "command", "commission", "assignment" or "mandate" which linguistically are among the possible alternatives clearly would not do. The conclusion of the Special Rapporteur is that "responsibility" is the best English word in the context, although it would be more satisfactory if a word other than "*responsabilité*" could be found for the French text.

112. The Special Rapporteur favours the retention of the expression as a whole because it covers all aspects of international relations, including the conclusion of treaties and their performance, and, without using the controversial term "sovereignty", covers the content of that term most relevant to the aspects of international law under consideration. Although the use of the term "sovereignty" might have the advantage of meeting the case of protected States, it is not thought that this in itself is sufficient reason for reintroducing the word with the consequent effect of narrowing the scope of the definition of "succession of States". The alternative suggestion of the United Kingdom Government, namely, to add the words "previously forming the territory or part of the territory of the first State" would also be open to the objection that it would narrow the scope of the draft.

113. As regards the third criticism, there seems to be some misunderstanding. The definition is speaking of the replacement of one (whole) State by another (whole) State. The omission of the definite or indefinite article ("the" or "a") before the word "territory" meets the problem of covering cases involving a whole territory as well as those where only part of a territory is involved. Accordingly, in this respect, in the opinion of the Special Rapporteur the text is correct as drafted.

114. While, for the reasons indicated, the Special Rapporteur does not advise the Commission to accept as valid the criticism of the expression "the responsibility for the international relations", he notes that the Cuban and Swedish comments have called attention to the implication of the expression "of territory" that "territory" itself has "international relations". To avoid this impression, the Special Rapporteur suggests that the Commission might consider the use of some expression such as "with respect to". The drafting may be open to further improvement, but paragraph 1 (*b*) might be amended to read:

"Succession of States" means the replacement of one State by another in the responsibility for international relations with respect to territory;

115. The main purpose of the comments of the Government of Tonga may be to make its own treaty position clear, but they amount to a complaint that there is nothing in the draft articles relating to the case of protected States. It is true that there is no special provision dealing with protected States (or other special cases such as mandates, trusteeships and protectorates). However, that is not the result of oversight on the part of the Commission nor does it necessarily mean that such special cases are excluded from the scope of the draft articles.

116. A substantial part of Sir Humphrey Waldock's fifth report on succession of States in respect of treaties was devoted to a proposed draft article 18 which provided expressly for "protected States", trusteeships and other dependent territories.[116] The draft article was supported by a rich commentary which discussed the problem of "protected States" in detail, dealing in particular with the case of Tonga.[117] There was a long quotation from the "general declaration of succession" made by the Government of Tonga in its letter of 18 June 1970 to the Secretary-General of the United Nations.[118] The proposed draft article 18 was discussed at the 1173rd to 1176th

[113] *Ibid.*, p. 270, 1196th meeting, para. 29.

[114] *Ibid.*, p. 271, 1196th meeting, para. 32.

[115] *Ibid.*, p. 271, 1196th meeting, para. 33.

[116] See *Yearbook ... 1972*, vol. II, p. 3, document A/CN.4/256 and Add.1-4.

[117] *Ibid.*, pp. 4-10, paras. 4-23 of the commentary to article 18.

[118] *Ibid.*, p. 8, para. 18 of the commentary to article 18.

meetings of the Commission (during its twenty-fourth session) and was subjected to considerable criticism by several members of the Commission. The view was expressed that the preceding articles were sufficient to deal with the cases covered by article 18. It was against this background that the article was referred to the Drafting Committee at the Commission's 1176th meeting, and it was not surprising that (as mentioned above [119]) the article never emerged from the Drafting Committee. It may be inferred that the special cases (including that of "protected States") were left to be covered, if at all, by the preceding articles.

117. In this connexion, one of the key provisions is the definition of "succession of States". A question may well arise whether, for the purposes of the draft articles, there is a "succession of States" within the meaning of the definition in the case of a "protected State", should any such case ever arise in the future. This would be a good test of the soundness of the definition. The answer in a particular case would, in the view of the Special Rapporteur, depend on whether or not there was in fact a replacement in the responsibility for the international relations of the "protected State". If the "protecting State" had been responsible for the international relations of the "protected State", and had not been acting merely in a representative capacity in the conclusion of treaties on behalf of the "protected State" there would be a "succession of States". If, on the other hand, the identity of the "protected State" as a State continued during the period of "protection" and the "protecting State" acted only in a representative capacity on behalf of the "protected State", on the termination of "protection" there would be no case of "succession of States". The treaties validly concluded on behalf of the "protected State" would in principle continue in force.

118. This hypothetical case comes very close to the position of Tonga as outlined in its comments which are mentioned above. There is no need to investigate the question whether the estimate of its position by the Government of Tonga was in fact correct, but it seems to the Special Rapporteur that an examination of the hypothetical case shows that the definition in sub-paragraph (*b*) is basically sound. Cases of representation in international relations should be distinguished from cases of responsibility for international relations and the former should be left outside the scope of "succession of States". Accordingly, the Special Rapporteur proposes that the Commission should make no change in the definition of "succession of States" on this account.

119. Reference should also be made here to the section of the present report, where the question of the extension of the draft articles to cover social or other forms of revolution is discussed.[120] If, contrary to the suggestion of the Special Rapporteur, the Commission were to decide to make such an extension, it might be necessary to find another definition for "succession of States" or to amend the present one. The drafting of paragraph 1, sub-paragraphs (*d*) and (*f*) would also require reconsideration.

[119] See para. 109 above.

[120] See paras. 50-57 above.

Paragraph 1 (*c*)

Observations and proposals of the Special Rapporteur

120. No oral or written comments on paragraph 1 (*c*) have been found and, even if the Commission should adopt minor drafting changes in paragraph 1 (*b*), this would probably not entail any amendment to paragraph 1 (*c*).

Paragraph 1 (*d*)

Comments of Governments

Written comments

121. *Czechoslovakia.* Mention is made in the present report of the suggestion in the written comments of the Czechoslovak Government that article 2, paragraph 1, should be amended so as to extend the clean slate principle to the "States which came into being as a result of a social revolution".[121] The Czechoslovak Government noted that the definition of "newly independent State" contained in article 2, paragraph 1 (*f*), did not cover all the possibilities and held that the formulation in question should be supplemented in the above sense or possibly, after appropriate modification of paragraph 1 (*d*) of the same article, dealing with the term "successor State", be deleted from the draft.

Observations and proposals of the Special Rapporteur

122. Once more the Special Rapporteur would refer members of the Commission to the relevant passage of the present report [122] and pending a decision by the Commission on the point of principle deems it expedient not to attempt either the suggested redrafting of paragraph 1 (*f*) or the suggested redrafting of paragraph 1 (*d*) coupled with the possible deletion of paragraph 1 (*f*).

123. Otherwise, the observations made on paragraph 1(*c*) apply equally to paragraph 1 (*d*).

Paragraph 1 (*e*)

Comments of Governments

Oral comments

124. *Pakistan.* The delegation of Pakistan said that, in paragraph 1 (*e*), the words "date" and "replaced" deserved to be particularly noted. Only one date of replacement of the predecessor State by the successor State, in respect of responsibility for international relations, was to be ascertained. That could be done more conveniently if the concept of replacement was defined. The delegation of Pakistan suggested that such replacement could be said to have two component parts. One was demonstrable capacity of the successor State to hold and administer the territory inherited by it and the other was the existence of sufficient international stability to be able to discharge the responsibility for

[121] See para. 52 above.

[122] See above, foot-note 120.

international relations. The delegation also remarked, in the context of comments on the clean slate principle that inherent in the concept of replacement was that of the continuity of the same territory.[123]

Written comments

125. *Czechoslovakia.* In the opinion of the Czechoslovak Government, it would be appropriate in connexion with the clarification in paragraph 1 (*e*) of the time when a succession of States occurs, to take into consideration the fact that a succession of States is part of a process which the successor State undergoes and to give thought to a formulation that would allow an indisputable determination of the moment when succession starts.

German Democratic Republic. The Government of the German Democratic Republic said that the draft left open the question at which date the succession of States occurred and who determined such date. Since, in international practice, succession normally took place as a process, it would be advisable to avoid any legal uncertainty, to include in the draft a formula which would stipulate unambiguously that the successor State, exercising the right of self-determination of its people, determined the date of succession and notified that date to other States.

United Kingdom. As recorded in the written comments in paragraph 1 (*b*), the United Kingdom Government pointed out that, if the expression "in the sovereignty in respect of territory" were used for the purposes of the definition of "succession of States", a consequential amendment to paragraph 1 (*e*) would be necessary.[124]

Observations and proposals of the Special Rapporteur

126. The comments of delegations raise an important point as to the date at which a succession of States occurs. It is most desirable that there should be clarity in this respect. As the Chairman of the Commission said at the end of the debate in the Sixth Committee at the twenty-seventh session of the General Assembly, a pertinent question had been raised about the point in time when the replacement of States that produced a succession occurred. As he also said, the specific time might indeed be very hard to determine, as for example in the case of national liberation movements, and the problem clearly required further study.[125]

127. The problem may be a difficult one, but it is necessary to be clear as to the nature of the problem. There are two distinct questions. One is whether the test of date of replacement is itself satisfactory and definitive. The other is how, if the text itself is satisfactory, the date is to be determined in any particular case. As to the test itself, there seems to have been general agreement that the *fact* of *replacement* of one State by another is sound. In the view of the Special Rapporteur, this is right and the Commission should proceed on the basis of this test, whether the replacement be in the responsibility for international relations with respect to territory or in the sovereignty over territory. If so the problem is how the date of occurrence of the *fact* of *replacement* is to be determined in any particular case.

128. In this connexion, it may be said that while the process of replacement may be prolonged the completion of that process must take place at a given point in time. The difficulty is not a theoretical one, but the practical one of ascertaining when the process has been completed. Objectively, this is a matter to be determined on the basis of the factual evidence and it may be observed that, in practice, it is likely to be easier to ascertain the time at which replacement is completed in the specific matter of responsibility for international relations, than in the less specific matter of sovereignty.

129. In either case, the Special Rapporteur suggests that the succession of States should be regarded as taking place at the time of *completion* of the process of replacement. Indeed, in the absence of any indication to the contrary, this would appear to be the natural and ordinary meaning of the word "replaced" in the context in which it appears in paragraph 1 (*e*).

130. In most cases of lawful "succession" there will be no difficulty in the determination of the date of replacement. However, in some cases there may be difficulty and it is necessary to consider what (if any) provision should be made to meet such cases. Broadly speaking, there seem to be four conceivable solutions (*a*) determination by the predecessor State, (*b*) determination by the successor State, (*c*) determination by agreement between the predecessor and the successor State and (*d*) on the basis of the facts in each particular case. Each of these solutions is open to some possible objection.

131. Although in many cases the date of replacement might be determined by the predecessor State, this would not be possible or proper in all cases. For example, if one State were voluntarily to become an integral part of another State, but before the union with the successor State failed to make the necessary determination, there would thereafter be no machinery for making it. Again, if a dependent territory declared and established its independence against the will of the predecessor State, there might be a difference between them as to the date of replacement which, in the circumstances, ought not to be determined by the predecessor State.

132. It might, therefore, be tempting to adopt the second solution, which corresponds to the suggestion of the German Democratic Republic, and provide for determination by the successor State. Unfortunately, such a provision would beg the very question it was intended to answer because it would have to be established that a succession of States had taken place before the "successor" would be in a position to exercise its right of determination. Moreover, such a solution would inevitably involve problems of recognition which, in the view of the Special Rapporteur, the Commission should as far as possible leave on one side in drafting the articles on succession of States in respect of treaties.

[123] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1325th meeting, paras. 21 and 22.

[124] See para. 103 above.

[125] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 9.

133. The third solution, namely determination by agreement between the predecessor State and the successor State, would be the most satisfactory in many cases, but would not always be possible and therefore could not be adopted as the sole solution. A combination of the first three solutions might be considered, but on reflection it will be realized that this would involve establishing priorities and would lead to further complexities.

134. Accordingly, the Special Rapporteur, with hesitation and reluctance, has come to the tentative conclusion that it would not be satisfactory to provide in the draft articles for determination of the date of replacement by the predecessor State or by the successor State or by agreement between them. The implication of this conclusion is that the definitions of "succession of States" and "date of the succession of States" should be left substantially as they are in paragraph 1, sub-paragraphs (*b*) and (*e*) and that the determination should be made on the basis of the facts in each particular case. In most instances, there is not likely to be any doubt about the relevant date. If any further clarification can be made, this should, of course, be done, but it should be recognized that the problem here is not so much one of lack of clarity in the text as possible difficulty in application due to factual doubts in particular cases. This is a phenomenon which is not uncommon in codifying conventions. Indeed, examples can readily be found in the Vienna Convention. In such circumstances, the prudent course may be to make some satisfactory and acceptable provision for the settlement of disputes arising out of the interpretation and application of the draft articles.

135. On the text of paragraph 1 (*e*), the Special Rapporteur has no concrete proposal, but the Commission might consider some explanation in the commentary which would make it clear that the date of replacement means the date on which the process of replacement either takes place or is completed. It is also for consideration whether a definition to that effect should be added, but, in the view of the Special Rapporteur, this is not necessary.

Paragraph 1 (*f*)

Comments of Governments

Oral comments

136. *Cuba.* The Cuban delegation said that the term "newly independent State" should cover all the various historical categories of dependent territories, including those resulting from new forms of colonialism, namely, those characterized by the presence of tyrannical and servile régimes, which, although theoretically independent, were unconditionally subject to the wishes of big imperialist Powers which exercised absolute control. The delegation continued by saying that liberation from the constraint of neo-colonialism and the establishment of a new régime that was fully independent politically and economically — also involved, therefore, a succession of States.[126]

[126] *Ibid.*, 1322nd meeting, para. 7.

Union of Soviet Socialist Republics. The delegation of the USSR commented that the term "newly independent State" rightly included all categories of formerly dependent territories.[127]

Byelorussian Soviet Socialist Republic. The delegation of the Byelorussian SSR said that the definition of newly independent States which appeared in paragraph 1 (*f*), although it did not apply to all cases of newly-formed States, had been selected so that it could be applied to all cases of States freed from colonialism.[128]

Written comments

137. *Czechoslovakia.* (See the comments in connexion with the draft articles as a whole and under paragraph 1 (*d*).)[129]

German Democratic Republic. (See the comments in connexion with the draft articles as a whole.)[130]

Sweden. The Swedish Government commented that the definition of "newly independent State" was not complete. The crucial term used was "dependent territory" and that term was not defined. It was obvious that in the view of the Commission "dependent territory" was something different from "part of a State" (used in the title of article 28) but the difference was not clarified by definitions, as would be desirable.

United Kingdom. The United Kingdom Government, in the light of article 28 and their comment thereon,[131] suggested the following:

"newly independent State" means a *successor* State the territory of which immediately before the date of the succession of States was *part of the territory of the predecessor State.* (Additions in italics.)

The Government said that the insertion of the word "successor" would emphasize the fact that a newly independent State is a category of successor State. They also said that the scope and meaning in particular cases of the term "dependent territory for the international relations of which the predecessor State was responsible" was not completely clear.

Observations and proposals of the Special Rapporteur

138. The comments of the United Kingdom Government raise a point of some substance relating to draft article 28. It amounts to a suggestion that, for the purposes of the draft articles, a part of a State that separates and becomes a State should be regarded as a "newly independent State". There is some logic in this suggestion but it would in fact give to the concept of "newly independent State" a different sense from the one intended

[127] *Ibid.*, 1324th meeting, para. 33.

[128] *Ibid.*, 1326th meeting, para. 40.

[129] See paras. 52 and 121 above.

[130] See para. 52 above.

[131] The United Kingdom Government's comment on article 28 is as follows:

"It is considered that paragraph 1 of this article should be included in part III which could be broadened to cover successor States which are not newly independent. As regards paragraph 2, this would become unnecessary were the definition proposed in these Observations for the term 'newly independent State' (Article 2, para. 1(*f*)) to be adopted."

by the Commission. It would involve the deletion of the words "dependent territory for the international relations of which the predecessor State was responsible" as well as the addition of the words "part of the territory of the predecessor State". In the view of the Special Rapporteur, this suggestion is a typical example of a case in which it would be advisable to deal first with the point of substance and afterwards to consider whether any alteration in the definition is necessary. Accordingly, the Special Rapporteur proposes that the Commission should postpone a decision on this aspect of the United Kingdom comments until it has dealt with article 28. On the other hand, the Special Rapporteur thinks that the insertion of "successor" before "State" would clarify and improve the draft and proposes that the Commission should adopt this suggestion.

139. So far as the comments of Governments raise the question of social or other forms of revolution with respect to paragraph 1 (*f*), the Special Rapporteur would again refer the Commission to the relevant passage in the present report.[132]

140. The comments of the Cuban delegation, however, raise a different point. In the absence of specific examples, it is difficult to visualize the case or cases that the Cuban delegation had in mind, but generally speaking the point seems to involve factual and political questions that cannot be answered satisfactorily by further refinement of the definition. In the opinion of the Special Rapporteur, the Commission would be wise not to devote its time and energies to such questions.

141. What does call for consideration is whether the expression "a dependent territory for the international relations of which the predecessor State was responsible" is sufficiently clear and precise. This expression has been criticized by the Governments of Sweden and the United Kingdom, but the term "newly independent State" was freely used by delegations during the debates in the Sixth Committee without criticism and with apparent understanding of what it was intended to mean. If any clarification were required, this is provided by the commentary in the report of the Commission.[133] With reference to the comments of the Government of Tonga mentioned in connexion with paragraph 1 (*b*),[134] attention may be called to a foot-note to the commentary to article 2 in the Commission's report which explains the position of "protected States" and "associated States" with respect to the meaning of "dependent territory" in sub-paragraph (*f*).[135] Having regard to the misunderstanding that has arisen about "protected States" it might be advisable to incorporate the substance of the foot-note into the text of the commentary.

142. If one analyses the text, the word "territory" is qualified in two ways, i.e. by the adjective "dependent" and by the expression "for the international relations of which the predecessor State was responsible". The use of that expression is consequential on the use of the corresponding expression in paragraph 1 (*b*). In this respect, the drafting of paragraph 1 (*f*) will depend on the decision of the Commission on sub-paragraph (*b*). It is the word "dependent" that gives the term "newly independent State" its special meaning, and the essential question here is whether the word "dependent" requires definition. In the view of the Special Rapporteur, although the meaning is clarified by the commentary, that meaning is not self-evident from the word itself as used in the context of paragraph 1 (*f*). Therefore, in principle, the term (if retained) ought to be defined; but the problem is to find a definition that will clarify the meaning without raising further questions of interpretation.

143. On the provisional assumption that article 28 is retained, the main purpose of the word "dependent" is to distinguish the case of a "newly independent State" from that of a new State created by separation of part of a State. It is intended to cover all "the various historical types of dependent territories".[136] Within this purpose, the meaning of "dependent territory" should be as wide as possible, leaving the limitation of the term to the condition for the occurrence of a succession of States, namely, that the predecessor State was responsible for the international relations of the territory. On this basis, if a definition is thought to be necessary, the Commission might consider the insertion between sub-paragraphs (*e*) and (*f*) of the following definition:

" dependent territory " means any territory which immediately before the date of the succession of States was not part of the territory of the predecessor State.

It might be suggested that the last expression should read "the metropolitan territory of the predecessor State". In the view of the Special Rapporteur, however, the insertion of the word "metropolitan" would not in itself clarify the meaning and it might be said that that word also requires definition. Therefore, if a definition of "dependent territory" were considered necessary, the Special Rapporteur would propose the above definition.

PARAGRAPH 1 (*g*)

Comments of Governments

Written comments

144. *Sweden.* The Swedish Government commented that "notification of succession" as defined in paragraph 1 (*g*) did not mean notification of a "succession of States" as defined in paragraph 1 (*b*), but notification of the consent of a successor State to be bound by a multilateral treaty, i.e., succession to a treaty. The use of the same term "succession" for these two different events was hardly consistent with the statement in the commentaries that the Commission's approach

is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State.[137]

[132] See paras. 50-57 above.

[133] Para. 6 of the commentary.

[134] See para. 103 above.

[135] See para. 6 of the commentary and foot-note 41.

[136] Para. 6 of the commentary.

[137] *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 29.

United Kingdom. The United Kingdom Government suggested that the words "considered as" might usefully be omitted here and elsewhere in the draft.

Observations and proposals of the Special Rapporteur

145. The words "considered as" are not used in the commentary. The Special Rapporteur thinks that they are superfluous and should be deleted.

146. From the point of view of purity of drafting, the criticism of the Swedish Government may be well-founded. The difficulty is to find a suitable alternative to the expression "notification of succession". Moreover, the word used is "succession" not "succession of States", so that the expression is not strictly speaking inconsistent with the commentary in the way suggested by the Swedish Government. On balance, the Special Rapporteur recommends retention of the expression "notification of succession".

PARAGRAPH 1 (*h*)

147. There were no comments or observations.

PARAGRAPH 1 (*i*)

Comments of Governments

Oral comments

148. *Venezuela.* The Venezuelan delegation said that paragraph 1 (*i*) was a departure from the text of article 11 of the Vienna Convention in that it excluded accession. The delegation remarked that the Commission had probably not considered such a concept viable in the relationship between a predecessor State and its successor. It appeared, however, that the draft articles did not entirely exclude the possibility that a successor State might accede to a treaty signed but not ratified by its predecessor, in a situation where it could become party to the treaty only by means of an arrangement embodied in its text. Further light was shed on such a situation in the text of article 14 and the commentary on it.[138]

Written comments

149. *United Kingdom.* The United Kingdom Government commented that a reference to accession could be added, in line with paragraph 1 (*j*) of the article.

Observations and proposals of the Special Rapporteur

150. While the terms "ratification", "acceptance" and "approval" are used in draft article 14, the term "accession" appears nowhere in the draft articles. It is true that the word "acceding" is used in paragraph 1 (*j*), but this is a definition of the term "reservation" derived from article 2, paragraph 1 (*d*), of the Vienna Convention. It seems to the Special Rapporteur that it would be superfluous to provide a definition of "accession" by insertion of the word in paragraph 1 (*i*) unless the term were used in one of the substantive provisions of the draft articles.

[138] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1327th meeting, para. 19.

PARAGRAPH 1 (*j*)

151. There were no comments or observations.

PARAGRAPH 1 (*k*)

152. There were no comments or observations.

PARAGRAPH 1 (*l*)

153. There were no comments or observations.

PARAGRAPH 1 (*m*)

154. There were no comments or observations.

PARAGRAPH 1 (*n*)

Comments of Governments

Oral comments

155. *Australia.* The Australian delegation suggested that paragraph 1 (*n*) should be amended to read: " 'international organization' means an international intergovernmental organization", and said that delegations from States which had a federal structure would appreciate the significance of that suggestion.[139]

Nigeria. The Nigerian delegation said that it would perhaps be advisable to add the word "international" before the words "intergovernmental organization", in order to remove any doubts which might arise when the expression was used in the context of States with a federal structure.[140]

Canada. The Canadian delegation agreed with the Australian proposal.[141]

Observations and proposals of the Special Rapporteur

156. The Special Rapporteur has no strong views on the suggestion made by the Australian delegation, but doubts whether the insertion of the word "international" before "intergovernmental organization" would achieve the result intended.

157. As pointed out in the commentary,[142] the wording of the definition corresponds to that used in the Vienna Convention. Therefore, in the interests of uniformity, on balance the Special Rapporteur favours the retention of paragraph 1 (*n*) as drafted.

PARAGRAPH 2

158. There were no comments or observations.

Article 3. Cases not within the scope of the present articles

Comments of Governments

Written comments

159. *Sweden.* The Swedish Government said that the principles contained in this article were not controversial,

[139] *Ibid.*, 1319th meeting, para. 2.

[140] *Ibid.*, 1324th meeting, para. 2.

[141] *Ibid.*, para. 14.

[142] Para. 8.

and it might be sufficient to refer to them in the commentary. If the article was maintained, its title should perhaps be changed. After all, the article was dealing with cases in which the provisions of the draft *were* applicable, under sub-paragraph (*a*) in substance and under sub-paragraph (*b*) also formally.

Observations and proposals of the Special Rapporteur

160. The fact that the article is non-controversial is not in itself a good reason for its omission. On the other hand, it does correspond to article 3 of the Vienna Convention, and is also useful in avoiding any misconception that might result from the limitations on the scope of the draft articles. Accordingly, the Special Rapporteur proposes that the article should be retained.

161. If the article is retained, the Swedish Government's comments on the title of the article will fall to be considered. In the opinion of the Special Rapporteur, the title is governed by the cases mentioned in the first part of the draft article and not by the "saving clauses" in sub-paragraphs (*a*) and (*b*). On this view, the title is correct. In any event, as regards sub-paragraph (*a*) the Special Rapporteur does not share the view of the Swedish Government. That sub-paragraph deals, not with the provisions of the draft articles as such, but with the rules of international law which exist independently of the articles. On the other hand, as regards sub-paragraph (*b*) the point is well taken and, if this sub-paragraph stood alone the title of the article should be altered. However, for the purpose of drafting the title, the article should be considered as a whole, and the consideration in the preceding paragraph seems to be overriding.

162. For the above reasons, the Special Rapporteur proposes the retention of the draft article and its title.

Article 4. Treaties constituting international organizations and treaties adopted within an international organization

Comments of Governments

Oral comments

163. According to the 1972 report of the Sixth Committee debates, reference was made with approval to the fact that the draft articles took into account the special aspects of succession in respect of treaties constituting international organizations and treaties adopted within an international organization and safeguarded the rules on membership and other relevant rules of the organization concerned. The opinion was expressed that treaties involving membership of international organizations should not be hastily succeeded to because membership might involve obligations such as budgetary commitments.[143]

Observations and proposals of the Special Rapporteur

164. It seemed convenient and expedient in this case to rely on the report of the Sixth Committee rather than to try to cite individual delegations.

165. The comments tend in the direction of approval of the draft article, and in the absence of any adverse comment from Governments, the Special Rapporteur proposes that the article be approved as drafted.

Article 5. Obligations imposed by international law independently of a treaty

Comments of Governments

Written comments

166. *Sweden.* The Swedish Government suggested that, as in the case of article 3, the content of this article might be transferred to the commentary.

Observations and proposals of the Special Rapporteur

167. The comment of the Swedish Government is the only one that has suggested any change with respect to this article.

168. It would be difficult to frame a suitable commentary without having the article as a basis for it and it would then be necessary to explain why no article corresponding to article 43 of the Vienna Convention had been included in the draft articles.

169. Although the article may not be necessary, the Special Rapporteur, for the above reasons, favours its retention.

Article 6. Cases of succession of States covered by the present articles

Comments of Governments

Oral comments

170. *Nigeria.* The Nigerian delegation said that the provisions of articles 3 to 9 appeared to be based on well-established principles of international law. In addition, the Commission had been wise to formulate article 6 in such a way as to safeguard the lawfulness of the succession of States covered by the draft articles. The delegation added that one could also endorse without difficulty the moving treaty frontiers principle embodied in article 10, since its application would necessarily depend upon strict invocation of article 6.[144]

Kenya. The delegation of Kenya could not see the utility of article 6, particularly as the Commission had included in article 31 rules concerning cases of military occupation and outbreak of hostilities.[145]

Union of Soviet Socialist Republics. The delegation of the USSR said that it should be noted that the draft articles applied only to cases of succession occurring in conformity with international law, as stated in article 6.[146]

Pakistan. The delegation of Pakistan pointed out that article 6 disregarded those types of succession which

[143] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 72.

[144] *Ibid., Sixth Committee*, 1324th meeting, para. 2.

[145] *Ibid.*, para. 6.

[146] *Ibid.*, para. 35.

might not occur in conformity with the principles of international law embodied in the Charter of the United Nations. The inclusion of such a provision, supporting the peaceful settlement of disputes, was of paramount value.[147]

Written comments

171. *Poland.* The Polish Government considered that the provisions of the draft articles could be applied solely to such cases of State succession as arose while the principles of international law, and in particular the principles enshrined in the Charter of the United Nations, were being respected. The provisions of articles 6 and 31, expressing this proposition, dispelled any doubts concerning both the scope of the term "succession of States" and the scope of certain other provisions of the draft. It was useful, therefore, to retain these provisions in their present form.

United Kingdom. The United Kingdom Government considered that article 6 was superfluous for the reason given in paragraph 1 of the commentary, and that, if included, the article might be open to different interpretations in particular cases.

United States of America. The Government of the United States, having expressed support for articles 1 through 5, said that the purpose of article 6, to make clear that succession with regard to territory which did not take place in accordance with the requirements of international law should not be considered as the type of succession that was envisaged in the draft articles, was laudable. There was a question, however, whether the formulation of the article achieved the end sought. To the extent that the articles imposed obligations upon successor States that were designed to promote the principles of the Charter of the United Nations there was no reason for excluding the imposition of such obligations upon any State that claimed to be a successor State in respect of territory. Thus, the provision in article 29, that a succession of States should not as such affect a boundary established by a treaty, should apply in the case of any territorial change. Its applicability, in fact, might be more necessary in the case of a territorial change having elements of illegitimacy than in cases where there was no question as to the legality of the succession.

The Government of the United States commented that it would be desirable to clarify article 6 to make it clear that the obligations in the draft articles applied in all cases. The article could be recast so as to provide that the rights conferred upon successor States in the articles might be exercised only by States whose succession had taken place in conformity with international law.

The Government of the United States also commented that it seemed advisable to revise the commentary. The position that the Commission drafted on the assumption that the rules it laid down would normally apply to facts occurring and situations established in conformity with international law appeared too broad. The entire subject of State responsibility, for example, was concerned with rules applying to situations where there had been a breach of international law. In preparing the Vienna Convention on Diplomatic Relations [148] the Commission had been concerned with formulating the normal rules for diplomatic intercourse among States. But in preparing the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons,[149] the Commission was dealing with conduct in violation of the Vienna Diplomatic Conventions and other treaties and of basic principles of international law.

Observations and proposals of the Special Rapporteur

172. At the twenty-seventh session of the General Assembly, at the conclusion of the debate in the Sixth Committee, the Chairman of the Commission remarked that some delegations considered article 6 essential whereas others had found it superfluous, and added that, on that point, the Commission would rely on whatever comments States wished to transmit to it.[150]

173. Unfortunately, the written comments have not provided a clear-cut answer to the question whether article 6 should be retained. One Government has supported its retention. One has suggested its deletion as superfluous. The third has suggested its amendment and modification of the commentary.

174. In the view of the Special Rapporteur, article 6 has to be considered in the context of the draft articles as a whole, and particularly article 2, paragraph 1 (*b*) and articles 10 and 31. The commentary to article 2, paragraph 1 (*b*), stresses that the definition of "succession of States" refers exclusively to "*the fact of the replacement* of one State by another".[151] There is no indication whether this fact occurs lawfully or unlawfully. For the purposes of the draft articles, if the definition of "succession of States" is kept in its present form, the definition, and consequently the draft articles, would appear to apply whether the fact occurred lawfully or unlawfully. The draft articles contemplate a "succession of States" occurring in various circumstances which might in fact be brought about unlawfully, e.g. in the case of a transfer of territory to which article 10 relates. Theoretically, it would be possible to clarify the intention of the draft articles by an amendment to article 2. For example, the definition of "succession of States" could be amended to refer to "the *lawful* replacement . . .". Such an amendment, however, would dilute the intention to refer exclusively to the *fact* of replacement and might lead to difficulties in the interpretation and application of the definition.

175. Although the intention that the articles should apply only "to facts occurring and situations established in conformity with international law" might be inferred

[147] *Ibid.*, 1325th meeting, para. 19.

[148] United Nations, *Treaty Series*, vol. 500, p. 95.

[149] *Yearbook . . . 1972*, vol. II, p. 312, document A/8710/Rev.1, chap. III, sect. B.

[150] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 12.

[151] Para. 3 of the commentary.

from the normal practice of the Commission, it would be unsafe to rely on that possibility. Therefore, it would be advisable to keep an express provision on the lines of article 6.[152]

176. If article 6 is to be kept, the question arises whether it is properly drafted. Should it exclude the application of the articles *in toto* in the cases to which it relates, or should it merely exclude the enjoyment of the benefits of the draft articles in those cases, as suggested in the comments of the United States? There is certainly some attraction in that suggestion, but there are considerations in favour of keeping the article in its present form. From the negative point of view, the exclusion of the application of the articles in "unlawful" cases would merely mean that the articles as such would not apply. So far as the rules of customary international law were reflected in the articles, those rules would still be applicable independently of the articles. Perhaps this point should be made in the commentary. There are, on the other hand, reasons of a more positive kind for excluding "unlawful" cases from the draft articles. It might be unwise for the Commission to attempt to regulate such cases partially, without considering all their legal implications—and that would be the effect of applying some of the provisions of the draft articles but not others. Also, a number of the draft articles do not distinguish clearly between the creation of rights and the imposition of obligations. They are concerned with the legal situation with respect to treaties resulting from a "succession of States"—the question whether treaties do or do not remain in force. One may refer for example to articles 10, 19 and 20. Articles 29 and 30 are not themselves cast in language which expressly creates rights and obligations. They are framed as exclusions or saving clauses. Accordingly, in the cases to which articles 29 and 30 relate, exclusion from the application of the draft articles as a whole would not seem to make any material difference.

177. In the light of these considerations, the view of the Special Rapporteur is that it would be preferable to cast article 6 in its present form. If, however, the Commission should decide to adopt the United States suggestion the article might be drafted on the following lines:

> The rights conferred by the present articles may only be exercised by a successor State if the succession of States has occurred in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

178. If article 6 is redrafted on the lines indicated in the preceding paragraph, the title will require alteration. It might be amended to read, "Limitation on the exercise of rights conferred by the present articles."

179. Whether article 6 is redrafted or not, the Special Rapporteur agrees with the comments of the Government of the United States on the need to clarify paragraph 1 of the commentary, and proposes that the commentary should be clarified accordingly.

Article 7. Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State

Comments of Governments

Oral comments

180. *Kenya.* The Kenyan delegation, commenting on article 7, agreed with the Commission that a devolution agreement concluded between the predecessor State and the successor State could not form the basis for a transmission of treaty rights and obligations to the successor State. The delegation said that upon acceding to independence a number of States—including Kenya—had rightly rejected agreements of that kind which had been concluded for the exclusive benefit of the colonial Power. The unilateral declarations of intent made by those countries were more in keeping with their new status as independent nations, since a new State succeeded not to treaties but to the competence to conduct its international relations and, consequently, to enter into treaty relations with other countries.[153]

Zambia. The Zambian delegation said that articles 7 and 8 were worded in such a way as to give equal significance to devolution agreements and unilateral declarations. While not contesting the Commission's view that, in the case of a State party to a treaty concluded by the predecessor State, the legal effect of a unilateral declaration would be analogous to that of a devolution agreement, the Zambian delegation felt that, if possible, the difference between the two forms of legal act should be reflected. A unilateral declaration was made voluntarily after careful consideration, whereas a devolution agreement might not always have been concluded quite freely. Furthermore, the delegation said, if treaty relations with the other State party were to continue in force, the latter must accept, tacitly at least, the provisional application of the treaty. A unilateral declaration and the acceptance, express or tacit, by the other State party had been used by the Zambian Government as a provisional method for maintaining most of its treaty relationships. It had preferred that procedure to negotiating the express revival of a lapsed treaty or a new treaty to replace it.[154]

Written comments

181. *United States of America.* The Government of the United States said that articles 7 and 8 might be clarified in each case by combining paragraphs 1 and 2 into a single paragraph which would say, in effect, that notwithstanding the conclusion of a devolution agreement, or a unilateral declaration by the successor State regarding the continuance in force treaties, the present articles

[152] Reference should be made in this context to the passage in the 1973 report of the Sixth Committee (*Official Records of the General Assembly, Twenty-eighth Session Annexes*, agenda item 89, document A/9334, para. 68), which relates to article 2 of the draft articles on succession of States in respect of matters other than treaties prepared by the International Law Commission at its twenty-fifth session. (*Yearbook . . . 1973*, vol. II, p. 203, document A/9010/Rev.1.) It was there recorded that several representatives stressed the importance of article 2 (corresponding to article 6 of the 1972 draft articles on succession of States in respect of treaties) and that it was pointed out that if the provision was included in one set of draft articles it also be included in the other.

[153] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 7.

[154] *Ibid.*, 1326th meeting, para. 7.

governed the effects of the succession with respect to treaties in force in the territory on the date of succession. As drafted, article 7 left some doubt as to its relationship to articles 35, 36 and 37 of the Vienna Convention and article 8 raised some questions as to the law of unilateral acts. Examination of the commentaries to these articles, such as the commentary to article 7 [155] and the commentary to article 8,[156] established the desirability of eliminating doubt on these points.

Observations and proposals of the Special Rapporteur

182. The comments by the delegations of Kenya and Zambia do not call for any change in article 7 except perhaps so far as they suggest that there might be some difference of tone or emphasis between article 7 and article 8 to reflect a difference of political attitude towards devolution agreements and unilateral declarations. Such a distinction, if it is to be made, is more suitable for the commentary than for the text of the draft article itself. With respect to article 7, the point seems to be adequately covered by the commentary.[157] As regards article 8, the point will be mentioned below in connexion with that article.

183. The comments of the United States Government affect the drafting of both articles, as well as the commentaries. It is convenient, however, to consider each article separately, especially because each article is concerned with a different kind of instrument.

184. If effect were given to the United States suggestion for the redrafting of article 7, it would read somewhat as follows:

Notwithstanding the conclusion of an agreement between a predecessor and a successor State providing that the obligations or rights under treaties in force in respect of a territory at the date of the succession of States shall devolve upon the successor State, the effects of the succession of States on those treaties shall be governed by the present articles.

185. No doubt the drafting is still open to improvement, but, in the view of the Special Rapporteur, this redraft has the advantages of simplifying and clarifying article 7 without any material loss. Accordingly, he proposes that the Commission should adopt a text for article 7 on the lines of the redraft in the preceding paragraph.

186. This change in the text, however, would not entirely dispose of the United States comments on this article. It would, of course, mean that if there were any difference between the provisions of the draft articles and those on treaties and third States of the Vienna Convention, the provisions of the draft articles dealing with the special case of succession of States would take effect. Having regard to the provisions of article 73 of the Vienna Convention, there could be no objection of principle to that result. Nevertheless, even if article 7 is amended in the way proposed, it might be advisable to clarify in the commentary the position vis-à-vis the provisions on treaties and third States of the Vienna Convention, especially articles 35, 36 and 37 as suggested in the comments of the United States Government. This is particularly desirable since paragraph 21 of the commentary refers expressly to articles 42 to 53 of the Vienna Convention. Any such addition to the commentary might follow paragraph 18, and paragraphs 19 and 20 might be combined into a single paragraph corresponding to the single paragraph of article 7.

Article 8. Successor State's unilateral declaration regarding its predecessor State's treaties

Comments of Governments

187. See the comments under article 7.[158]

Observations and proposals of the Special Rapporteur

188. If effect were given to the United States suggestion for the redrafting of article 8, it would read somewhat as follows:

Notwithstanding the fact that a successor State has made a unilateral declaration purporting to continue in force in respect of its territory treaties to which the predecessor State was a party in respect of that territory at the date of the succession of States, the effects of the succession of States on those treaties shall be governed by the present articles.

189. For reasons similar to those given in the case of article 7, the Special Rapporteur proposes that the Commission should adopt a text for article 8 on the lines of the above redraft.

190. As regards the comments of the delegations of Kenya and Zambia, the Special Rapporteur thinks that the differences between devolution agreements and unilateral declarations and the circumstances in which they are made are sufficiently clear from the commentaries as they stand. If desired, however, it would be possible to add a sentence at the end of paragraph 20 of the commentary to article 8, referring to paragraph 21 of the commentary to article 7. It might say that different considerations would apply to a declaration as a unilateral act and that, in practice, it is less likely to be made as a result of "coercion" than a devolution agreement. The Special Rapporteur would not favour such an addition because he is not convinced that devolution agreements have been procured by "coercion".

Article 9. Treaties providing for the participation of a successor State

Comments of Governments

Oral comments

191. *Venezuela.* The Venezuelan delegation said that the Commission's approach to the matter dealt with in article 9 had been balanced. The precedents cited included, in paragraph 9 of the commentary to that article, the agreement between the United Kingdom and Venezuela regarding the Guyana [formerly British

[155] Paras. 15-17 of the commentary.

[156] Paras. 16 and 17 of the commentary.

[157] Para. 21 of the commentary.

[158] See paras. 180-181 above.

Guiana] Venezuela frontier and in paragraph 12 of the commentary the Commission had referred to the need "to require some evidence of subsequent acceptance by the successor State in all cases . . . ". The delegation commented, however, that in at least one significant precedent practice indicated that such consent could be given in the act of signature itself, which would be binding upon the future successor State and make it a party to the instrument or, possibly, by the execution by the successor State of acts which clearly showed its intention of continuing to be bound by the treaty.[159]

Written comments

192. *United Kingdom.* The United Kingdom Government said that the Commission's proposal in article 9, paragraph 2, that express acceptance in writing was required appeared to be unduly restrictive. In the sort of situation under consideration tacit consent should be permitted.

Observations and proposals of the Special Rapporteur

193. The comments of the Venezuelan delegation and the United Kingdom Government both raise the same point with respect to paragraph 2 of article 9. They do not question the principle of the paragraph, namely, that where a treaty purports to lay down that, on a succession of States, the successor State shall be considered as a party, the provision cannot automatically bind the successor State; nor do they question the view of the Commission that it would be preferable to require some evidence of acceptance by the successor State in all cases (as stated in the commentary).[160] The point is whether it is necessary to require express acceptance in writing for the successor State to be considered a party to the treaty.

194. As indicated in the commentary,[161] the provisions of paragraph 2 may apply to a variety of cases of succession of States. In the future, cases of "newly independent States" are likely to be increasingly rare. In some cases, even of "newly independent States", continuity may be desirable in the interests of the successor State, but the requirement of express acceptance in writing might create constitutional or other difficulties. What really matters is that the successor State shall be free to make its own decision whether or not to be considered as a party to the treaty. If the intention to be a party is freely formed, the method of giving expression to that intention is of subsidiary importance. Indeed, it might be said that once a new State has control of its own destiny it should not be fettered as to the manner in which it may express its will or its intentions.

195. On the other hand, the analogy between the position of a successor State and that of a "third State" within the meaning of the Vienna Convention is not entirely sound. If the successor State were always to be regarded as a "third State", there would be no need for a set of rules dealing separately with "succession of States in respect of treaties".

196. For the above reasons, the Commission may like to reconsider its decision to require acceptance in writing for the purposes of paragraph 2. That requirement was based on the analogy of article 35 of the Vienna Convention. In this connexion, the Special Rapporteur does not make any proposal, but the Commission may like to consider the possibility of adapting the terms of article 37, paragraph 1, of the Vienna Convention for the purpose of introducing a greater measure of flexibility into paragraph 2 of draft article 9. If that course were adopted, the last clause of paragraph 2 might read: "only if it is established that it was the intention of the successor State to be so considered". There are, of course, various other ways of introducing a measure of flexibility into paragraph 2, but the draft now suggested would leave it in the hands of the successor State to choose its own method of establishing its intention to be considered as a party to the treaty.

PART II

TRANSFER OF TERRITORY

Article 10. Transfer of territory

Comments of Governments

Oral comments

197. *Spain.* The Spanish delegation said that the Commission might examine the possibility of extending to article 10 the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty, provided for in article 25 and other articles.[162]

Nigeria. The Nigerian delegation said that one could endorse without difficulty the "moving treaty frontiers" principle embodied in article 10, since its application would necessarily depend upon strict invocation of article 6.[163]

Written comments

198. *United Kingdom.* The United Kingdom Government said that reference to "administration" went too far and might lead to uncertainty. The point in the commentary [164] should be included in the draft article, e.g. by beginning "subject to the provisions of the present articles", as in draft article 11. The Government also said that, in the final phrase of sub-paragraph (*b*), the compatibility test, which existed in relation to reservations, was proposed: this required careful study. It would be preferable to make a more direct reference to the example of a treaty intended or expressed to have a restricted territorial scope which was given in the commentary.[165]

[159] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1327th meeting, para. 20.

[160] Para. 12.

[161] Paras. 12 and 14.

[162] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1320th meeting, para. 26.

[163] *Ibid.,* 1324th meeting, para. 20.

[164] Para. 12 of the commentary.

[165] Para. 11 of the commentary.

Finally the questions of impossibility of performance and fundamental change of circumstances also needed to be considered in this connexion.

United States of America. The Government of the United States considered that for the purposes both of clarity and of consistency it would be desirable to replace the phrase "under the sovereignty or administration of a State" with a phrase based on article 2, paragraph 1 (*b*), such as "when territory as to which one State has responsibility for international relations . . .".

Observations and proposals of the Special Rapporteur

199. These comments raise points on three parts of the draft article. Each of these will be considered in sequence as it affects the text.

200. First, it seems to the Special Rapporteur that the United Kingdom Government's comment that the point in the commentary should be included in the article is sound. The present contrast between articles 10 and 11 might be read as implying that a transfer of territory could have the effect of altering the boundary régime of the country with respect to other States party to the relevant treaty, whereas the transfer as such can only affect the territorial régime as between the predecessor and successor States. For these reasons, the Special Rapporteur proposes the insertion of the words "Subject to the provisions of the present articles" at the beginning of article 10.

201. Secondly, the United Kingdom and United States Governments have suggested changes in the introductory words. Although from different points of view, both have criticized the expression "under the sovereignty or administration", and the effect of both comments would be to bring article 10 into line with their view of what should be said in the definition of "succession of States" in article 2, paragraph 1 (*b*).

202. There is, however, an important difference of substance. The United Kingdom suggestion would limit the application of article 10 to territories under the "sovereignty" of a State. This would be more restricted than was the intention of the Commission as expressed in the commentary,[166] which was to cover not only territory under the sovereignty of the predecessor State but also territory under an administering Power responsible for its international relations. If the United Kingdom comments on article 2, paragraph 1 (*b*), were accepted, the change suggested for article 10 would be a natural corollary.[167]

203. The United States suggestion, on the other hand, would accord with the intention of the Commission expressed in the commentary and with the definition of "succession of States" in its present form.

204. In the view of the Special Rapporteur the scope of article 10 should correspond to the scope of the draft articles which results from the definition of "succession of States". Moreover, as a principle of drafting, if a term has been defined, that term should be used if possible because the use of new terms is likely to lead to doubt and confusion.

205. Accordingly, the Special Rapporteur proposes the following introductory words for article 10:

> Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State.

206. Thirdly, there are the comments of Spain and the United Kingdom that affect the limitation on the application of sub-paragraph (*b*) expressed in the clause "unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose".

207. The suggestion of the Spanish delegation is comparatively simple and effect could be given to it by adding at the end of sub-paragraph (*b*) words taken from article 25, e.g., "or would radically change the conditions for the operation of the treaty". The comments of the United Kingdom Government go further. In effect, they suggest that the "compatibility test" should be replaced by limitations based on (*a*) the restricted territorial scope of the treaty, (*b*) impossibility of performance and (*c*) fundamental change of circumstances.

208. It may be observed in passing that the "compatibility test" is likely to prove difficult to apply in particular cases and that its presence makes the addition of satisfactory procedures for the settlement of disputes desirable, if not essential. However, the same remark may be made, though perhaps with less force, about the other tests suggested. In the view of the Special Rapporteur difficulties of application should not be regarded at this stage as an overriding consideration. What is important is to ensure that the substance of the provision is right in the sense that it will cover the kinds of cases which should be excepted from the operation of sub-paragraph (*b*). Another consideration is that there should be a reasonable degree of consistency between the provisions of the draft articles.

209. For these reasons, the Special Rapporteur would be inclined to agree with the Spanish suggestion and bring the text of article 10 into line with that of article 25 (on the provisional assumption, of course, that the text of article 25 remains as drafted).

210. On the other hand, while the United Kingdom suggestion to use the example in paragraph 11 of the commentary in place of the " compatibility test " would have the advantage of certainty, it does not seem to the Special Rapporteur that it would cover all cases that might arise. For example, there might be treaty provisions relating to residents of the successor State which clearly should not be applicable to residents of the transferred territory, yet the provisions of the treaty might not have a "restricted territorial scope" except so far perhaps as this might be implied from the test of residence. But, depending on the nature of the obligations contained in the treaties, one treaty might properly be applicable to residents in the transferred territory while

[166] Para. 6 of the commentary.

[167] See the United Kingdom Government's written comments under article 2, para. 1 (*b*) and the Special Rapporteur's observations (paras 103, 111 and 112 above).

another might not. Accordingly, the Special Rapporteur, while regarding the "restricted territorial scope" as a good example, does not regard it as providing a satisfactory criterion.

211. The questions of impossibility of performance and fundamental change of circumstances raise different considerations. Here we have rules of international law which, broadly speaking, are embodied in articles 61 and 62 of the Vienna Convention. These are general rules applicable to all treaties whether those treaties have been the object of a "succession of States" or not. The Special Rapporteur has serious doubts whether, in relation to particular cases of succession, it would be wise to make special provision for the application of such rules. Subject to the special provisions of the draft articles, a succession of States cannot affect the application of the rules of law applicable to all treaties. Surely the continuance in force of treaties by virtue of the draft articles cannot change the nature of the treaties or, in general, the rules of international law applicable to them. If there is any doubt on this point, the Special Rapporteur would suggest that the Commission should consider a suitable draft article for inclusion in the general provisions, making the position clear: such a draft article might be inserted as article 4 *bis* or article 5 *bis*. He would not advocate trying to write into the present draft articles all the relevant rules contained in the Vienna Convention.

212. While recognizing that the compatibility test is not in itself entirely satisfactory, on balance the Special Rapporteur favours its retention with the addition at the end of sub-paragraph (*b*) of the words: "or would radically change the conditions for the operation of the treaty".

213. For the reasons indicated above, the Special Rapporteur proposes the following amended text:

Article 10. Transfer of territory

Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State.*

(*a*) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession;

(*b*) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose **or would radically change the conditions for the operation of the treaty.***

PART III

NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

Article 11. Position in respect of the predecessor State's treaties

Comments of Governments

214. To avoid unnecessary repetition reference is here made to the comments of Governments as given earlier in the present report under the heading "The principle of self-determination and the law relating to succession in respect of treaties".[168] However, the views of the Government of Tonga touching the principle of article 11 were not given in that Section and they are summarized here.

215. *Tonga.* The Government of Tonga complained that the Commission had not taken adequate account of the general declaration of succession made by Tonga on 18 June 1970 and addressed to the Secretary-General of the United Nations. It maintained that the theoretical basis of article 11 was not supported by the modern practice of newly-independent States which had made general declarations of succession to treaties, with the intention of keeping rights gained by them from treaties, except where the treaties were inapplicable in the new circumstances or "involved fundamental and not merely incidental restraints upon sovereignty".[169] The Commission had put too much stress on the burdens as distinct from the benefits of treaties and had erred in only providing for the inheritance of the "real" treaties, thereby preserving an obsolete distinction between "real" and "personal" treaties. While respecting the intention behind the provision for newly independent States to opt into "multilateral treaties" by a declaration of succession, the Government of Tonga asserted that this contradicted the principle of mutuality which was of the essence of treaty law. The intention of the Government of Tonga when it issued its general declaration was not to claim freedom to pick and choose but freedom to examine its treaties by reference to objective legal criteria to ascertain if they were in force. The Government of Tonga interpreted other general declarations of succession as embodying a like intention.

The Government of Tonga then called attention to the difficulties flowing from the right of option.

Pending a notification of succession everybody concerned, in the depositaries and in foreign Governments, would have to act on the assumption that any particular treaty was not in force for the newly independent State. This would be most inconvenient in relation to activities such as those of the High Commissioner for Refugees or the International Committee of the Red Cross. The need to examine a list, possibly, of several hundred would inevitably involve delay and would leave a time gap that would not in all cases be effectively filled by the retrospective effect of a notification of succession. What, for example, would be the position under the Warsaw Convention on International Carriage by Air if an aircraft crashed between the day of independence and the notification of succession? The Government of Tonga believed that the draft articles should aim to hold the treaty position of the newly independent State stable long enough "to enable the matter to be sorted out." [170] Finally the Government of Tonga believed that its own experience of the continuance of treaty relationships provided a better guide to the contemporary legal position

* Words in **bold type** are replacements for or additions to the original draft.

[168] See paras. 24-30 above.

[169] ILC(XXV)/Misc.2, para. 7.

[170] *Ibid.*, para. 12.

than the old cases of the independence of Belgium or Panama cited by the Commission.

Observations and proposals of the Special Rapporteur

216. It is hoped that the above summary does justice to the arguments of the Government of Tonga, which were circulated to members of the Commission in June 1973. Those arguments touch not only article 11 and the principle stated in it but also a number of other articles including articles 8, 12, 18 and 22. So far as article 11 is concerned, the Special Rapporteur could not advise the Commission to act on the view of the Government of Tonga in preference to the overwhelming body of opinion expressed on behalf of Governments of States Members of the United Nations. Moreover, the attitude of the Government of Tonga seems to be coloured by its own assessment of its position as a former "protected State", which is not typical of the position of most formerly dependent territories. In this connexion, the Special Rapporteur refers to his observations in the section of the present report dealing with the principle of self-determination and the law relating to succession in respect of treaties [171] and under article 2, paragraph 1 (*b*).[172]

217. While not proposing any change in article 11, the Special Rapporteur recognizes that in some cases the strict application of the "clean slate" principle could operate unsatisfactorily, even from the point of view of the newly independent State. Accordingly, care should be taken to ameliorate such consequences so far as possible in the subsequent articles in connexion with which the arguments of the Government of Tonga, as well as the general comments of the Government of Sweden and other Governments of Member States will be borne in mind.

SECTION 2. MULTILATERAL TREATIES

Article 12. Participation in treaties in force

Comments of Governments

Oral comments

218. *Netherlands.* The Netherlands delegation wondered whether an exception should not be made to the clean slate principle in the case of the law-making treaties concluded by or under the auspices of the United Nations. Treaties such as the Vienna Conventions on Diplomatic Relations and on the Law of Treaties had not been made by a foreign Power in possible disregard of any right of self-determination. They were law-making acts of the world community intended to regulate international relations in general. To consider newly independent States automatically bound by such Conventions seemed equally as acceptable as considering them automatically bound by customary international law and by general principles of international law. There were at least two reasons for attributing a special status to such Conventions. First, some rules of law of world-wide application were essential in human society and, whenever the United Nations succeeded in making world-wide legal rules, everything possible should be done to strengthen them. Secondly, the draft articles should bind new legal entities which might be formed under international law. How, asked the delegation, could the rights and obligations of such entities be regulated if it were stated at the outset that the rules being made would not be binding upon them? In this connexion the division of multilateral conventions into those of a restrictive and those of a more general character required further study.[173]

France. The French delegation said that some of the provisions in the draft were rather imprecise, such as those providing for exceptions to the proposed rules in cases where the new situation resulted in a radical transformation of the obligations and rights provided for in a treaty.[174]

United States. The United States delegation said that the restrictions provided for in article 12, paragraph 3, on succession to treaties of limited participation seemed judicious. The delegation also supported the clean slate principle in the way in which it had been applied in articles 11 to 25.[175]

Australia. The Australian delegation said that in article 12 it was recognized that for a new State to participate in certain multilateral treaties the consent of all existing parties might be required. It did not, however, deal with a situation where some parties might object to the notification of succession and others might not. In such a case, apart from the situation dealt with in paragraph 3, it was the delegation's view that the treaty would be in force between the new State and some of the States parties but not others. The delegation called attention to the results of the Advisory Opinion of the International Court of Justice concerning reservations to the Convention on Genocide [176] and the rule adopted in article 20 of the Vienna Convention.[177]

Greece. The delegation said that in the solutions proposed by the Commission, the clean slate principle was taken as being equally valid with regard to multilateral treaties, as was indicated in article 12. In that respect, the delegation wondered whether, in regard to multilateral treaties of a law-making character concluded under the auspices of the United Nations, an exception to the clean slate principle might not be in the interest both of the new State and of the international community as a whole. Most of such treaties had been drafted in harmony with the principles of the Charter of the United Nations and might be regarded to a large extent as codifications of customary law. Furthermore, said the delegation, it was most important for the maintenance of international peace and security and for the strengthening of the rule of law to recognize the applicability

[171] See paras. 28-30 above.

[172] See paras. 104-119 above.

[173] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1317th meeting, paras. 18, 19 and 20.

[174] *Ibid.,* 1318th meeting, para. 15.

[175] *Ibid.,* para. 18.

[176] *I.C.J. Reports 1951,* p. 15.

[177] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1319th meeting, para. 3.

of law-making conventions, especially those containing provisions of a *jus cogens* character.[178]

Spain. The Spanish delegation said that the Commission should give more detailed consideration to the different categories of multilateral treaties in the context of the succession of States. Article 12, paragraph 3, and article 13, paragraph 3, recognized the existence of a few multilateral treaties of limited participation without designating them by that name which led to the somewhat involved wording of article 14, paragraph 1 (*a*) and (*b*) and other provisions. It would be appropriate, as the Netherlands delegation had suggested, to specify a category of "general" multilateral treaties which, in the view of the Spanish delegation, were those "which deal with the codification and progressive development of international law, or object and purpose of which are of interest to the international community as a whole." [179] The delegation added that account should also be taken of the problem raised by the Australian delegation with regard to article 12 which made no provision for the case where some parties to a multilateral treaty approved a notification of succession while others were opposed to it. This problem might be solved by affirming the existence of three categories of multilateral treaties: those of limited participation, the normal and the general. The Spanish delegation also suggested the addition, in article 12, paragraph 2, of the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty provided for in article 25, sub-paragraph (*a*), etc.[180]

Cuba. The Cuban delegation observed that the clean slate situation of a newly independent State in respect of both bilateral and general multilateral treaties did not mean that the State in question could not be a party to them. Under article 12, a newly independent State might be a party to any multilateral treaty in respect to the territory to which the succession related although it could not be regarded as automatically bound by that treaty.[181]

Ghana. On the question of succession in respect of multilateral treaties, the delegation of Ghana said that the determining criterion could be more simply explained as dependent on the legal nexus established by the predecessor State between the territory concerned and the terms of the multilateral treaty. Moreover, new States should take time to reflect before accepting succession to treaties involving membership in international organizations in view of the various obligations that were involved.[182]

Nigeria. The Nigerian delegation expressed the view that articles 11 to 25 achieved a necessary balance between the need to allow newly independent States freely to determine the nature and the content of their treaty relations and the interest of the international community in ensuring the stability of those relations. An exception to the clean slate principle should be made in the case of law-making treaties concluded under the auspices of the United Nations, since they had not been made by foreign Powers but were acts of the world community intended to regulate international relations. The Nigerian delegation, however, did not agree that newly independent States should be considered automatically bound by such treaties: they should be able to decide whether to accede to the treaties, in exercise of their right to self-determination.[183]

Kenya. The delegation of Kenya said that the exception to the clean slate principle mentioned by other delegations, including that of the Netherlands, concerning law-making treaties concluded under the auspices of the United Nations had been rejected by the Commission and was considered unacceptable by the newly independent countries. Those countries were most anxious to participate in the formulation of the norms of international law and could not accept that a group of States, often sharing common ideologies and social and economic interests, should legislate for the whole international community. They wanted unfettered discretion to determine what multilateral treaties of a general nature they should accede to; that did not mean that they were not bound by customary international law or by general principles of international law.[184]

Canada. The Canadian delegation said that article 12 reflected the consensual element, which was the essence of treaty relationships, in providing that a newly independent State could not establish its status as a party to a multilateral treaty without the consent of the other parties when it was clear from the nature of the treaty that such consent was necessary. There seemed to be some merit in the suggestion that newly independent States should be bound by treaties of a general law-making character concluded under the auspices of the United Nations, but the Canadian Government would like to give further thought to the suggestion particularly in the light of the comments made by various newly independent States.[185]

Belgium. The Belgian delegation said that, in article 12, paragraph 2, the Commission seemed to have confused the notion of the object and purpose of a treaty with the conditions which might govern the admission of a new party. The delegation said that the present provision could be retained with the addition of the phrase "or if the successor State is not able to satisfy the condition or conditions of participation". With regard to paragraph 3, perhaps the possibility should not be ruled out that a special multilateral treaty could enter into force as between the new State and only some of the States already parties to it.[186]

Netherlands. In reply to certain remarks of the representative of Kenya, the Netherlands delegation said that it had merely wished to stress that universal law-

[178] *Ibid.*, 1320th meeting, para. 9.

[179] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (*op. cit.*), p. 285, document A/CONF.39/26, annex.

[180] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, paras. 25 and 26.

[181] *Ibid.*, 1322nd meeting, para. 3.

[182] *Ibid.*, para. 35.

[183] *Ibid.*, 1324th meeting, para. 3.

[184] *Ibid.*, para. 8.

[185] *Ibid.*, para. 14.

[186] *Ibid.*, para. 24.

making conventions were of general benefit to the international community and the Sixth Committee and the Commission might develop criteria for defining such conventions. They might, for example, include conventions adopted by an overwhelming majority of the members of the international community or concluded under the auspices of the United Nations and dealing with questions of general and permanent interest.[187]

Zambia. The Zambian delegation, while supporting the clean slate principle, expressed in article 11, attached due significance to the provision in article 12 whereby newly independent States might participate in multilateral treaties by a notification of succession.[188]

Morocco. Although the draft articles were on the whole satisfactory, the delegation of Morocco regretted that they did not provide for an exception to the clean slate principle so that newly independent States would automatically be parties to multilateral law-making treaties, such as the Vienna Convention or the proposed convention on succession of States in respect of treaties. That was a serious omission.[189]

Written comments

219. *German Democratic Republic.* The Government of the German Democratic Republic said that a clearer wording would seem to be necessary for article 12, paragraph 2, and article 13, paragraph 2, according to which a successor State could not notify its participation in a multilateral treaty in force or not yet in force, if the object and purpose of the treaty were incompatible with the participation of the successor State in that treaty. The Government did not hold the present version adequate to exclude arbitrary hindrance of successor States from becoming parties to treaties.

Poland. The Government of the Polish People's Republic said that it was highly desirable to establish a time-limit, be it even seven or ten years, during which a newly independent State could use its right to notify its succession in respect of a multilateral treaty. Then it would be clear, at least from a certain point in time, what was the legal position—e.g., other States parties would know the date from which they should take into account the possibility of the retroactive application of a treaty in relation to newly independent States. On the other hand, in the event of expiry of the term, a newly independent State would always have the right to accede to the treaty. The Government also commented that there were no provisions in the draft seeking to regulate the legal status of other States parties to the multilateral treaty vis-à-vis newly independent States during the period between a succession of States and notification of succession in respect of the treaty (*inter alia*, in the light of the fact that notification of succession has retroactive effects). This question raised some doubts, e.g., whether the fact that the legal nexus existing between the other States parties and territory which became the territory of a newly independent State had been broken on the day of assumption of independence by that State, resulted in the termination of all treaty obligations of other States parties in respect of this territory, or whether they had at least the obligation to restrain themselves from acts tending to obstruct the resumption of the operation of the treaty.

It was also unclear whether because of retroactive effects of the notification of succession, other States parties could be held responsible for acts inconsistent with the treaty and committed after the assumption of independence by a newly independent State and before the date of succession of such State in respect of the treaty. The Polish Government, as well as certain other parties to various multilateral treaties, was interested in the proper regulation of these questions.

Finally, the Polish Government added that, in the occasionally very long lapse between the date of a State's succession and notification of succession, a different situation might occur—e.g., termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including, for instance, the predecessor State). The draft, in article 21, paragraphs 2 and 3, covered similar problems in respect of bilateral treaties. Explicit regulation of these problems also in relation to multilateral treaties would seem desirable.

Sweden. The Swedish Government commented that, as the option to notify continued adherence to a general multilateral treaty was apt to cause uncertainty as to the validity of those treaties for new States, it seemed to be a minimum requirement that a time-limit should be set for the exercise of the option. For similar reasons, it might be desirable to provide a time-limit also for agreements by which restricted multilateral treaties under article 12, paragraph 3, and bilateral treaties, under article 19, were continued.

United Kingdom. The United Kingdom Government said that, although the rule proposed in paragraph 1 was subject to the exceptions in paragraphs 2 and 3, they considered that insufficient weight was given to the intention of the parties to a particular treaty. As regards paragraph 2, whilst not opposing the proposal that a notification of succession might be made even though the accession provisions of a particular treaty did not cover a certain newly independent State,[190] the intention of the parties could appear from the wording of the treaty as well as from its object and purpose.

United States of America. The Government of the United States supported the general approach taken in part III of the draft articles but a number of improvements could be made. Article 12 permitted any newly independent State to become party to a multilateral treaty that applied to its territory prior to independence subject, *inter alia*, to the requirement that the participation of the State was not incompatible with the object and purpose of the treaty. A requirement of that type was reasonable but the question arose whether the test to be applied could be made more precise. A further question

[187] *Ibid.*, para. 40.

[188] *Ibid.*, 1326th meeting, para. 6.

[189] *Ibid.*, para. 18.

[190] Para. 8 of the commentary.

was how a determination was to be made whether succession to the treaty was or was not consistent with its object and purpose. Regarding the first issue, the Government said that it would appear that whenever a successor State could accede to a treaty there should not be any reasonable doubt as to its right to succeed to the treaty. While this would appear to be a reasonably obvious conclusion, it might be included in the article. Where the question of compatibility was unclear, however, and the treaty concerned had no provision for dealing with the situation, a number of difficult questions arose. If a party to the treaty were to object on the ground of incompatibility, would this be sufficient to prevent succession? If not, did the objection result in barring treaty relationships between that party and the successor State? Questions of the same character arose also with respect to a number of other articles in which the requirement of compatibility with object and purpose was laid down—article 13, paragraph 2; article 14, paragraph 1; and article 15, paragraph 2 (*c*). The United States Government considered that the Commission should attempt to reduce this area of uncertainty to the extent possible although it recognized that a number of questions regarding interpretation and application of the articles must be left to solution on a case by case basis. The United States Government also commented that various problems were complicated by the factor that, in authorizing the new State to make a declaration of succession, article 12 did not contain any limitation as to time. A State could make such a notification five, ten, or twenty-five years after becoming independent and the declaration would have retroactive effect for the entire period. The possible effects upon long-settled legal relationships were sufficiently extreme to require some protective measures. It would be desirable to provide a time-limit within which the right to notify succession must be expressed. The period should be long enough so that the new State had time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of other States party to the treaty would be seriously impaired by the retroactive effect of notification. A period of three years would seem to be sufficient for the new State to reach a determination while not being so long that private litigants or a court, for example, could not postpone a judgement pending clarification of the applicability of a treaty. In this connexion, an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period.

Observations and proposals of the Special Rapporteur

220. The extensive comments of delegations and Governments have been set out at length because of the importance of both the article and the comments. The points that arise for consideration may be grouped under six headings:

(*a*) Law-making treaties;

(*b*) Time-limits;

(*c*) The interim régime;

(*d*) Grounds for excluding the application of paragraph 1 of article 12;

(*e*) Objections to a notification of succession;

(*f*) Termination, suspension or amendment of the treaty before notification of succession (*cf.* article 21, paragraphs 2 and 3).

(a) *Law-making treaties*

221. Before offering his own observations, the Special Rapporteur wishes to recall the statement made by the Chairman of the Commission at the conclusion of the debate in the Sixth Committee at the twenty-seventh session of the General Assembly. He said that, with regard to article 12, many delegations had posed the question whether the principle of continuance should be applied in the case of general law-making treaties. The Commission itself had devoted considerable time to the question and had come to the conclusion that it was not the practice for the principle of continuance to be applied, but that posed the question of whether existing practice should be considered correct. The Commission had felt that since other States were not bound to become parties to general law-making treaties it would not be fair or equitable to impose such an obligation on newly independent States. That conclusion, he added, seemed reasonable: for example, it seemed quite understandable that a new State might consider that it had enough problems to cope with without being bound by a treaty on the utilization of outer space.[191]

222. In the commentary to article 11,[192] the Commission examined the question whether a newly independent State is to be considered as automatically subject to the obligations of multilateral treaties of a law-making character concluded by its predecessor applicable in respect of the territory in question. The conclusion reached was that the evidence of State practice appeared to be unequivocally in conflict with the thesis that a newly independent State "is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence".[193] This conclusion, however, is to a considerable extent based on the practice of depositaries. Without minimizing the importance of their practice, it must be said that depositaries exercise an administrative function, and it is not part of their functions to decide difficult or disputed questions of law. As paragraph 2 of article 77 of the Vienna Convention makes plain, any difference between a State and the depositary as to the performance of the latter's functions should be brought to the attention of the signatory and the contracting States or, where appropriate, of the competent organ of the international organization concerned. State practice with respect to the Geneva Red Cross Conventions is conflicting. As stated in the commentary, quite a number of States have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating re-

[191] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 13.

[192] Paras. 8-14.

[193] Para. 14 of the commentary to article 11.

cognition of an obligation to accept the Conventions as successors to their predecessor's ratifications. On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession.[194]

223. In the light of examples such as this, it cannot properly be said that State practice is all one way. Nevertheless, it may be accepted that the weight of depositary and State practice is "in conflict with the thesis that a newly independent State is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence". This proposition, however, is concerned with the existence of an "obligation" on the newly independent State to consider itself bound. It does not necessarily close the door on further consideration of the nature of the option to be exercisable by a newly independent State to continue or not to continue participation in particular kinds of multilateral treaties. In theory, the option could take the form either of an option to accept status as a party to a treaty by a notification of succession or of an option to discontinue that status by notification of discontinuance on the assumption in the latter case that, after the date of the succession of States, the newly independent State was regarded as a party to the treaty.

224. The draft articles provide for the former kind of option—a right to opt in. In the light of the comments set out above, the Commission may wish to consider whether, on balance, it would be more satisfactory to provide for an option of the latter kind—a right to opt out.

225. Attention has been called to the difficult legal situation that might result from a delay in notification (especially a long one) in the case of certain kinds of multilateral treaties, and the doubts and confusion that might result from the retrospective effect of a notification of a succession of States. It may be asked whether the creation of such a dubious legal situation is in the interests of the newly independent State or of the international community—especially in the case of law-making treaties such as the Vienna Conventions on Diplomatic Relations, on Consular Relations and on the Law of Treaties, not to mention treaties such as those designed to ameliorate the conditions of humanity in time of war, to restrict the development of weapons of mass destruction or facilitate the rescue and return of astronauts, etc. On the other hand, it is difficult to see what unacceptable burdens would be cast on a newly independent State by participation in such treaties. The attention of the Government of the newly independent State would soon be called to any treaty which caused it real inconvenience and it would then be free to terminate its participation if it wished to do so. If the burdens were in fact too onerous the newly independent State would doubtless be quick to exercise its option not to continue as a party to the treaty. Moreover, the administrative task of examining multilateral treaties to which the newly independent State might be a party would be no more onerous in the case of a right to opt out than in the case of a right to opt in. On the other hand, the general advantage of a right to opt out would be to provide a factor that might militate in favour of continuity and stability in treaty relations in an area where this is most desirable in the interests of international co-operation and peace and security.

226. There would, however, be certain objections to casting the right of the newly independent State in the form of an option to discontinue participation in a certain class of multilateral treaties. One possible objection is that an option in that form would involve treaty obligations for the newly independent State before it had had an opportunity to examine their implications. This might tend to put pressure on the State to review its position at an early stage in a hurry before it had had time properly to organize its administrative services. On the other hand, it might be said that it is desirable that the treaty position of the newly independent State should be clarified as promptly as possible and that an option such as that provided in article 12 (read with article 18) would tend to encourage delay.

227. Another possible objection is the difficulty of identifying and defining "law-making" multilateral treaties. What are "law-making" treaties? One answer, in effect suggested by the Spanish delegation, is treaties which deal with the codification and progressive development of international law or of which the object and purpose are of interest to the international community as a whole. Whether the class of treaties is called "general" or "law-making" multilateral treaties, in the view of the Special Rapporteur, although the intention is fairly clear, such a broad definition would be too vague for inclusion in a convention. Indeed, the concept "law-making" treaties is itself misleading and scientifically inexact. Treaties may codify existing customary international law, in which case they are not "making" law; or treaties may create "new law" in which case they are binding on the parties and do not as such create new customary international law. What is usually meant by "law-making" treaties is, of course, treaties of a hybrid character containing elements of both codification and progressive development. But as pointed out in the commentary [195] such treaties may contain "purely contractual" provisions, such as, for example, a provision for the compulsory adjudication of disputes.

228. In the light of considerations such as those mentioned above, the Special Rapporteur has come to the conclusion that it would not be possible to provide a satisfactory and workable definition of "general" or "law-making" treaties except by the simple device of making the provision applicable to all multilateral treaties not falling within paragraph 3 of article 12. The only other practicable alternative would seem to be to provide some test or machinery for identifying "law-making" treaties. For example, the provision might be made applicable to all multilateral treaties having more than a certain number of parties (signatories), or to all multilateral treaties adopted within or under the auspices

[194] Para. 10 of the commentary to article 11.

[195] Para. 8 of the commentary to article 11.

of the United Nations. Again a list might be established by the Secretary-General, by a committee established by the General Assembly or by the General Assembly itself. There is a great variety of choice, but the Special Rapporteur does not consider that it would be fruitful to examine them further at this stage.

229. Although there is considerable attraction in the doctrine of continuity in the case of "law-making" multilateral treaties, the Special Rapporteur does not think that the balance of considerations in favour of that doctrine is sufficiently strong to justify a recommendation that the Commission should alter the principle expressed in draft article 12. The Special Rapporteur does suggest, however, that the matter should be dealt with in the commentary to article 12 in the light of the above comments and observations and the deliberations of the Commission.

(b) *Time-limits*

230. In their written comments, the Governments of Poland, Sweden and the United States have said that there should be some limit on the time within which a notification of succession may be made.[196] The Swedish comments also point out that this question arises in article 12, paragraph 3, and article 19.

231. The consequence of suspension of treaty rights and obligations for newly independent States pending notification of succession coupled with the retroactive effect of the notification is bound to create a period of legal doubt and uncertainty. This consequence might be made more tolerable for the States concerned if a definite limit were placed on the length of the period of uncertainty. As the Polish Government said, if there were a time-limit within which a newly independent State could exercise its right to notify its succession in respect of a multilateral treaty, it would at least be clear from a certain point in time what was the legal position—e.g., other States would know the date from which they should take into account the possibility of the retroactive application of a treaty in relation to newly independent States. The reasoning in the comments of the Swedish and United States Governments is similar and seems to the Special Rapporteur to be sound.

232. Although time-limits on the actions of sovereign States are often viewed with disfavour, they are by no means uncommon where an option is exercisable or a notice is to be given. An example is to be found in paragraph 5 of article 20 of the Vienna Convention which provides that a reservation may be considered as accepted if no objection is raised within a period of twelve months.

233. For the purposes of a notification of succession under article 12, the Polish Government contemplates a period as long as seven or ten years, while the United States Government has suggested a period of three years. Whatever period is selected the criterion suggested by the United States Government seems to be right, namely—

> The period should be long enough so that the new State has time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of other States party to the treaty would be seriously impaired by the retroactive effect of notification.

Whether on the basis of these considerations three years is a long enough period is a matter of judgement on which the Special Rapporteur would prefer not to express a definitive view, but that period may provide a convenient starting point for the deliberations of the Commission.

234. If the Commission decides not to adopt an "opting-out" formula for paragraph 1 or make some such provision for multilateral treaties of a "law making" character, a time-limit can be provided by a simple amendment. For the above reasons, on this provisional basis, the Special Rapporteur proposes the following amended text for article 12, paragraph 1:

> 1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession **made within a period of [3] years from the date of the succession of States,*** establish its status as a party to any multilateral treaty which **at that date *** was in force in respect of the territory to which the succession of States relates.

Of course, if the Commission should take a different decision, more radical amendments will be necessary.

235. In connexion with the matter of time-limits, the United States Government has also said that an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period. Although at first sight this suggestion seems eminently fair and reasonable, it does raise difficult and complex problems which, in the context of the present draft articles, might involve a series of provisions out of proportion to the magnitude of the hardship or injustice that might occur.

236. Presumably the intention would be to protect the private claimant against periods of prescription or limitation under the internal law of a State, and not to try to deal with the problem on the international level where fixed periods of prescription or limitation do not normally exist. However, there are, of course, cases in which multilateral treaties themselves lay down fixed periods within which action has to be taken and the question may arise whether such periods should run while the particular treaty is in suspense between the newly independent State and another State party to the treaty pending the notification of succession. A situation could arise in which the period had expired before the date of the notification of succession and yet the expiration of the period would operate against the other State party by virtue of the retroactive effect of the notification. Such cases may be rare and the actual consequences for the States concerned would depend on the provisions of the particular treaty. Although it is possible to foresee cases of potential hardship, the Special Rapporteur does not think that it would be practicable to provide a blanket provision to cover all multilateral treaties.

237. Somewhat similar considerations apply to periods of prescription or limitation under the internal law of a State. There is, however, the additional factor that a

[196] See para. 219 above.

* Words in **bold type** are replacements for or additions to the original draft.

suspension of the running of such periods would require legislation. The Special Rapporteur doubts whether it would be feasible to require newly independent States to enact such legislation, although in theory enactment of the necessary legislation could be made a condition precedent to the exercise of the right to make a notification of succession.

238. In the view of the Special Rapporteur, although he does not see the possibility of making provision to meet the point raised by the United States Government, it is a fairly strong argument in favour of as short a period as possible for the making of a notification of succession.

(c) *The interim régime*

239. Between the date of the succession of States and that of the notification of succession there will be an interim period under the provisions of articles 12 and 18 as at present drafted. In the case of a particular multilateral treaty, there may be a legal vacuum as between the newly independent State and any other State party to the treaty. At best, as the Polish Government has pointed out, the position is unclear. What, if any, obligation will there be on another State party to observe the provisions of the treaty with respect to the newly independent State pending the notification of succession? May it then be exposed to accusations of breach of the treaty by virtue of conduct occurring during the interim period when there were no obligations incumbent on the newly independent State and the other State did not know whether or not a notification of succession would be made? This is a dilemma created for the other State party and not for the newly independent State, because the latter would be able to avoid embarrassing consequences for itself by using paragraph 2 (*c*) of article 18. It could avoid retroactive effect, and the consequences of its own conduct occurring before the date of the notification of succession, by specifying a date later than the date of the succession of States as the date from which the treaty should be considered as being in force.

240. Unless there is some flaw in the above analysis, the provisions of paragraph 1 of article 12, read with those of article 18 would result not only in an interim régime of doubt pending the notification of succession but also in legal inequality between the newly independent State and the other State party to the multilateral treaty. These consequences might be avoided by the adoption of an "opting-out" instead of an "opting-in" provision for paragraph 1 of article 12. But the Commission may prefer to maintain the principle of paragraph 1 and to seek some other solution to the problems raised by the Polish Government, or to accept the apparent inequality as an unavoidable consequence of the special position of the newly independent State.

241. In the context of article 12, no alternative solution springs to mind, although a provision on the lines of article 18 of the Vienna Convention—i.e. some form of good faith obligation incumbent on the newly independent State and the parties to the treaty pending the notification of succession—might help. Such a provision would be made easier to operate in practice if there was a reasonable time-limit for the making of the notification.

242. A better balance might also be secured by some modification of the retroactive effect of a notification of succession, but this point will be examined in the context of article 18 where the provision is made. The Special Rapporteur has no concrete proposals to make at this stage except that the Commission should give careful consideration to the above-mentioned problems, with a view to finding solutions that not only accord with past practice, but also ensure fair and workable provisions for the future.

(d) *Grounds for excluding the application of paragraph 1 of article 12*

243. As appears from the commentary to article 12 [197] the Commission has contemplated three qualifications on the exercise of the right for which paragraph 1 of article 12 provides. These are covered by article 4 and by paragraphs 2 and 3 of article 12. There is no call here for further observations on article 4 or paragraph 3, but a number of comments touch on paragraph 2. They are those of the Spanish, Belgian and (possibly) French delegations and those of the Governments of the German Democratic Republic, the United Kingdom and the United States. Without making any concrete suggestions, the French and German Democratic Republic comments have criticized the drafting as unclear or imprecise. The Spanish delegation suggested the addition to the exception of cases where a succession radically changed the conditions for the operation of the treaty (the language actually criticized by the French delegation). The Belgian delegation suggested the addition of "or if the successor State is not able to satisfy the condition or conditions of participation". The United Kingdom Government considered that insufficient weight was given to the intention of the parties and as concerned paragraph 2 the intention of the parties could appear from the wording of the treaty as well as from its object and purpose. The United States Government suggested that it might be made clear in the text that, whenever a successor State had the right to accede, it had the right to succeed.

244. In the light of the above comments, it appears that the compatibility test is acceptable and is to be retained. If there is to be any attempt at clarification, it should be by addition to, rather than alteration of, the well-known formula. That there may be difficulties in the application of the formula is obvious, but once more this points to the need for satisfactory means for the settlement of disputes.

245. The Special Rapporteur has given careful consideration to the four specific suggestions for amendment to paragraph 2 and will try to indicate his conclusions briefly. The Belgian suggestion touches the very point dealt with in the commentary[198] and, having regard to the commentary, is adequately covered by the text as drafted. The Special Rapporteur has been unable to imagine a case in which it could be maintained that succession by a newly independent State having a right to accede to a treaty was incompatible with the object and purpose of that treaty. He would, therefore, be

[197] Paras. 10, 11 and 12.

[198] Para. 11.

reluctant to burden the text with an amendment to meet the suggestion of the United States Government. As regards the Spanish suggestion, the case dealt with in article 12 is different from that dealt with in article 25 (newly independent States formed from two or more territories) or in article 10 (transfer of territory) and the Special Rapporteur is not convinced that in article 12 there is a case for the suggested addition. If the Commission were to take a different view, the point could be met by the addition to paragraph 2 of the words "or the effect of that participation would be radically to change the conditions for the operation of the treaty."

246. The United Kingdom Government's suggestion is less clear-cut than those mentioned in the preceding paragraph. The desire to give effect to the intention of the parties is understandable, but the nature of the intention for which the United Kingdom Government would provide is not clear. Does their suggestion mean that a newly independent State should not be entitled to make a notification of succession to a multilateral treaty if it appears from the wording of the treaty that the intention of the parties is to exclude its succession? If so, the case would be covered by the words "under the terms of the treaty" in paragraph 3 and no further provision would appear to be necessary. Perhaps discussion will throw further light on this suggestion, but at present the Special Rapporteur does not consider it necessary to make any proposal to give effect to it.

(e) *Objections to a notification of succession*

247. The question of the effect of an objection to a notification of succession was raised by the delegations of Australia and Spain and the Government of the United States with reference to paragraph 2, and by the Belgian delegation with reference to paragraph 3. It is convenient to consider the comments of the last-named delegation first.

248. With regard to paragraph 3, the Belgian delegation said that perhaps the possibility should not be ruled out that a special multilateral treaty could enter into force as between the new State and only some of the States already parties to it. It seems to the Special Rapporteur, however, that that possibility would run counter to the purpose of paragraph 3, the effect of which should be maintained as it now stands.

249. The first question mentioned above is more complicated. In effect, the Australian and Spanish delegations suggested that where, on grounds of incompatibility falling within paragraph 2, some parties objected to a notification of succession while others did not, the treaty should be regarded as being in force between the newly independent State and the latter, but not between that State and the former. In this connexion, reference was made to article 20 of the Vienna Convention which provides a precedent for some such differentiation.

250. The United States Government raised the question in a somewhat different form. It asked how a determination was to be made whether succession to the treaty was or was not consistent with its object and purpose. Assuming for the moment that there is no satisfactory procedure for making this determination, what would be the effect of an objection on grounds of incompatibility? Would the objection prevent succession or, if not, would the objection bar treaty relationships between the objecting State party and the newly independent State? The United States Government also pointed out that similar questions arose with respect to article 13, paragraph 2; article 14, paragraph 1; and article 15, paragraph 2 (*c*), which applied the compatibility test. As regards article 15, paragraph 2 (*c*), the questions would already appear to be answered in the sense of article 20 of the Vienna Convention by virtue of the provisions of paragraph 3 of draft article 15. Article 14, paragraph 1 itself depends on articles 12 and 13. Hence the questions really arise for consideration with respect to those two articles, and only indirectly with respect to article 14.

251. At present, there is no provision for a system of "objections" for the purposes of article 12, 13 or 14. Equally, there is no provision for the settlement of any differences that may arise in the application of those articles. The Special Rapporteur does not find very attractive the idea of introducing a system of objections which would enable another State party to a multilateral treaty to prevent the participation of a newly independent State in cases in which participation is not limited by reason of the nature of the treaty (i.e. under paragraph 3 of article 12 or of article 13). To give another State party the right to prevent the treaty from entering into force between itself and the newly independent State by making an objection would, in theory at least, deprive the newly independent State of the freedom of choice which the draft articles are designed to confer on it. Any other State party would, in relation to itself, be free to frustrate the decision of the newly independent State to bring the treaty into force between itself and that State.

252. The position under paragraph 2 of article 12 or 13 is not quite the same as in the case of reservations, because in the former the question is whether participation is itself compatible with the object and purpose of the treaty while in the latter the question is whether a reservation is compatible. If a State chooses to make a reservation to a treaty, it runs the risk that other States will find the reservation unacceptable. It does not follow that individual States should be given the right to decide that the participation of a newly independent State in a treaty is unacceptable. Such a result would be contrary to the general intent of the articles in part III of the draft.

253. For these reasons, the advice of the Special Rapporteur is that the Commission should decline to introduce a system of objections for the purposes of article 12, paragraph 2 or 3, or of article 13, paragraph 2 or 3. Unfortunately, if that advice is accepted, it will not solve the fundamental problem of any differences that may arise in the application of any of those paragraphs. In these circumstances, in the view of the Special Rapporteur, the sensible course would be to seek suitable means for settling any differences which may arise in the application of article 12 or 13 (or 14).

(f) *Termination, suspension or amendment of the treaty before notification of succession (cf. article 21, paragraphs 2 and 3)*

254. In its written comments, the Polish Government suggested that in the case of multilateral treaties there should be explicit regulation of problems arising from "termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including for instance the predecessor State)." The Government pointed out that article 21, paragraphs 2 and 3, covered similar problems in respect of bilateral treaties.

255. The Commission recognized in respect of bilateral treaties that the point might not be of great importance.[199] It seems to the Special Rapporteur to be of no greater importance with respect to multilateral treaties. As the draft is already heavy with detail, additions to meet points of this kind should not be made unless they are necessary. It is most doubtful whether they are necessary in the case of multilateral treaties having regard to the provisions of the articles as drafted. The right of the successor State to make a notification of succession in respect of a multilateral treaty depends on whether it was in force in respect of the territory to which the succession of States relates at the date of the succession of States. So far as concerns the right to make a notification of succession what happens subsequently is irrelevant. Once a notification has been made, the treaty will be regarded as in force for the successor State as from a certain date. In the case of a multilateral treaty, this must mean the treaty and its provisions in whatever condition they stand at that date. The effect of regarding the treaty as in force from a certain date will also have the consequence that after that date the treaty will have the same effect for the successor State as for any other State party to it. If this is right, any withdrawal, termination, suspension of operation or amendment would have the same effect—no more and no less—for the successor State as for any other State party to the treaty. This seems to be the clear intention of articles 12 and 13 read with article 18

256. For these reasons, the Special Rapporteur makes no proposals for amendments to meet the suggestion of the Polish Government, but the Commission may wish to add some explanation on the point in the commentary, perhaps to article 18 rather than to article 12.

Article 13. Participation in treaties not yet in force

Comments of Governments

Oral comments

257. *Finland.* Articles 13 and 14, which give the successor State the right to participate in certain multilateral treaties not yet in force or to ratify, accept or approve a multilateral treaty signed by the predecessor State were innovations which, according to the Finnish delegation, seemed at a first reading to be acceptable.[200]

Spain. The Spanish delegation made certain comments about article 12, paragraph 3, and article 13, paragraph 3, which are recorded above.[201]

The Spanish delegation also suggested the addition in article 13, paragraph 2 of the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty, provided for in article 25, sub-paragraph (*a*), etc.[202]

Written comments

258. *German Democratic Republic.* (See the comments under article 12 above.)[203]

Sweden. The Swedish Government said that the intended sense of the phrase "multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates . . . " was better expressed in the commentary by the wording "multilateral treaty not yet in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound with reference to the territory in question . . . ". The text of the article would accordingly be improved by replacing the first-mentioned phrase by the latter one.

United Kingdom. (See the comments under article 12 above.)[204]

United States of America. (See the comments under article 12 above.)[205]

Observations and proposals of the Special Rapporteur

259. With the exception of the general comment of the Finnish delegation and the drafting amendment to paragraph 1 of article 13, the comments made on article 12 also apply to article 13. Accordingly, it has not been thought necessary to repeat or to refer expressly to those comments except where the delegation or Government has itself mentioned article 13.

260. It follows that the observations of the Special Rapporteur on article 12 also apply to article 13 and, broadly speaking, any decisions taken by the Commission on article 12 will likewise govern its decisions on article 13. If, however, contrary to the expectations of the Special Rapporteur, the Commission should decide to cast article 12 in the form of an "opting out" (rather than an "opting in") clause, that decision would not automatically apply to article 13. On the contrary, since article 13 is concerned with the case where a treaty is not in force in respect of the territory at the date of the succession of States, it seems clear that it must be cast in the form of an "opting in" provision, as it is in the draft.

261. For the reasons already indicated,[206] it is desirabled to make provision for some time-limit (say, three years)

[199] Para. 14 of the commentary to article 21.

[200] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 3.

[201] See para. 218 under article 12 above.

[202] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 26.

[203] See para. 219 above.

[204] *Ibid.*

[205] *Ibid.*

[206] See paras. 230-234 under article 12 above.

within which a notification of succession may be made under article 13. To meet the point, paragraph 1 of article 13 might be amended using a formula similar to that proposed for paragraph 1 of article 12.

262. It remains to consider the drafting amendment to paragraph 1 suggested by the Swedish Government. This suggestion is eminently one for consideration by the Drafting Committee, but it may be helpful to add two observations here. First, the Swedish comment does call attention to the desirability of making it clear that the consent to be bound given by the predecessor State referred to the territory in question. The last clause of paragraph 1 as drafted does not make that point clear. Secondly, as a matter of drafting it is convenient to use the expression "contracting State" which is defined in paragraph 1 (*k*) of article 2 as meaning "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". Therefore, it would seem better to retain the words "had become a contracting State" rather than to substitute for it the words "had established its consent to be bound . . . ". Drafting in this way has the additional advantage of consistency in using the expression "a contracting State" which appears earlier in paragraph 1.

263. In the light of the above considerations (on a provisional basis, as in the case of article 12), the Special Rapporteur proposes the following amended text for article 13, paragraph 1:

" 1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession **made within a period of** [3] **years from the date of the succession of States,*** establish its status as a contracting State to a multilateral treaty, which **at that date** * was not in force in respect of the territory to which that succession of States relates, if **at** * that date the predecessor State **was** * a contracting State **in respect of that territory.*** "

Article 14. Ratification, acceptance, or approval of a treaty signed by the predecessor State

Comments of Governments

Oral comments

264. *Finland.* (See the comments under article 13 above.) [207]

Spain. (See the comments under article 12 above.) [208]

Belgium. The Belgian delegation said that article 14 dealt with a situation which was quite hypothetical and it could well be deleted.[209]

Zambia. The Zambian delegation was in some doubt as to the necessity of article 14 because it did not consider that the signature of a treaty subject to ratification or approval justified the transfer to the successor of the obligations which the precedessor State had accepted. It suggested therefore that the article should be deleted.[210]

Written comments

265. *Sweden.* The Swedish Government commented that the Commission had included this article in order to enable Governments to express their views on it and thereby assist the Commission in reaching a clear conclusion as to whether it should be maintained in the draft. The article seemed to be in line with the clean slate doctrine and at the same time it demonstrated its tendency to lead to inequality between States. The Government pointed out that it was stated in the commentary that "even on the assumption of the adoption of this article, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State".[211] The successor State would in other words be able to take advantage of a right established by the predecessor's signature of a treaty without assuming the obligation of good faith pertaining to that right. In these circumstances, the inclusion of the article could hardly be recommended.

United Kingdom. The United Kingdom favoured the effectiveness of multilateral treaties. However, the proposal in this article was not free from difficulty. The practice of the United Kingdom was to consult the Government of each British dependent territory about its attitude to a particular treaty after signature and before ratification. Moreover, it had not been the practice of the United Kingdom Government to include treaties signed but not ratified in the list of treaties compiled for each dependent territory before its independence. On balance, it was considered by the Government that the need for the proposed new rule was not great enough to outweigh its difficulties.

United States of America. (See the comments under article 12 above.) [212]

Observations and proposals of the Special Rapporteur

266. As explained in the commentary,[213] article 14 was included in the draft to enable Governments to express their views so that the Commission might reach a clear decision on the point which it raises when undertaking the revision of the draft articles. The essential question is whether the article should be retained. Unfortunately, the comments made by delegations and Governments do not provide a clear answer to that question. Some of the comments implicitly assume that the article will be retained. The Finnish delegation considered that, at first reading, the article seemed to be acceptable. The Belgian delegation, on the other hand, thought that the article dealt with a situation which was quite hypothetical and could well be deleted. The Zambian delegation also suggested the deletion of the article. The Swedish and United Kingdom Governments, though for different reasons, favoured the deletion of the article. In these circumstances, it becomes necessary to consider whether the reasons for retention of the article are sufficiently strong.

* Words in **bold type** are replacements for or additions to the original draft.

[207] See para. 257 above.

[208] See para. 218 above.

[209] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1324th meeting, para. 24.

[210] *Ibid.*, 1326th meeting, para. 8.

[211] Para. 8 of the commentary to article 14.

[212] See para. 219 above.

[213] Para. 5.

267. In support of the retention of the article, it may be said that signature of a treaty does create a legal nexus between the signatory State and the treaty, at least in the sense that the State, by virtue of its signature, acquires the right to ratify, accept or approve the treaty in accordance with the provisions of the treaty. That right may apply to territory which becomes the territory of the newly independent State. Therefore, it may be asked why should not the newly independent State have the benefit of that right to the extent of being entitled, as a successor State, to ratify, accept or approve the treaty on its own behalf? If this view is accepted, there is sufficient theoretical justification for the retention of the article on the basis of the principle that underlies articles 12 and 13.

268. On the other hand, there is no body of practice by States or depositaries in support of article 14 such as exists in the case of articles 12 and 13. Moreover, as pointed out in the commentary, although the question had a special interest some years ago in relation to certain League of Nations treaties,[214] there is no immediate pressing need for a provision such as that contained in article 14. The possibility of it proving necessary in the future cannot be very great or be likely to arise in many cases.

269. The article, as drafted, itself raises some problems. There is the problem of inequality to which the Government of Sweden has called attention. Surely the "good faith obligation" of the predecessor State as a signatory could not be imposed on the successor State. What then would be the position as between the successor State and other signatory or contracting States? It would appear that they would be bound by the "good faith obligation" but the successor State would not.

270. A second problem arises out of the words "and by the signature intended that the treaty should extend to the territory to which the succession of States relates". How is such intention to be established? In some cases, the intention of the signatory State may be declared at the time of signature or may be otherwise made clear. In others, the intention may be unknown. As the United Kingdom Government has said, an intention one way or the other may not be formed until after signature of the treaty. Even if, at the time of signature, the predecessor State had the intention that "the treaty should extend to the territory . . . ", that intention might be abandoned after consultation with the local authorities or Government.

271. A third problem relates to the question of time-limits. Consideration of the question of time-limits underlines the difference between the cases intended to be covered by article 14 and those covered by articles 12 and 13. In the latter, the right of notification of succession is one that exists apart from the provisions of the treaty concerning ratification or accession. In the former, the right to ratify would appear to be one that should be exercised in accordance with and subject to the procedures and conditions provided by the treaty. On this reasoning, there would be no need for a time-limit on the exercise of the right to ratify, because ratification by the successor State could take place whenever ratification could be effected by any signatory State, but only within any time-limit provided by the treaty for ratification by the signatories. However, if article 14 is to be retained, perhaps there should be some provision as to the conditions governing ratification, acceptance or approval by the successor State, making it clear that, in this respect, the relevant provisions of the treaty would apply. But such an amendment would not remove the necessity for sub-paragraphs (*a*) and (*b*) of paragraph 1, which themselves import into article 14 the difficulties of application involved in the provisions of the paragraphs of articles 12 and 13 to which they refer.

272. A fourth problem—or perhaps a series of problems—appears from an examination of article 14 in the light of articles 10 to 18 of the Vienna Convention. Article 14 of the draft reflects article 14 of the Vienna Convention, but cases other than those of signature followed by ratification, acceptance or approval might arise. For example, the treaty might be initialled rather than signed and consent to be bound might be expressed by subsequent signature: or the treaty might be signed *ad referendum* by a representative and subsequently confirmed by his State thereby expressing its consent to be bound by the treaty. These examples are suggested by articles 10 and 12 of the Vienna Convention. Article 11 of the Convention also raises the question whether provision should be made in article 14 (if retained) for cases where consent to be bound by a treaty is to be expressed after authentication of the text by some agreed means other than ratification, acceptance or approval. Indeed, articles 10 and 11 of the Vienna Convention raise the question whether article 14 (if retained) should cover all cases where authentication of the text is a separate preliminary step prior to the expression of a State's consent to be bound by a treaty. Having regard to problems such as these, the Special Rapporteur doubts whether it would be satisfactory to retain article 14 in its present form.

273. Finally, there has been some criticism of the draft articles on the ground that they are already too complicated, and article 14 could be omitted without breach of principle or running counter to established practice.

274. For all these reasons, the Special Rapporteur proposes that article 14 be deleted.

Article 15. Reservations

Comments of Governments

Oral comments

275. *Netherlands.* The Netherlands delegation said that, in article 15, it might be advisable to strengthen the law-making conventions by not automatically maintaining reservations to them.[215]

Australia. The Australian delegation said that article 15, as provisionally adopted by the Commission, provided in effect that the new State should step exactly

[214] *Ibid.*

[215] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1317th meeting, para. 19.

into the shoes of its predecessor. The delegation said that that conclusion was not dictated by pure logic. The adoption of the clean slate principle led logically to precisely the opposite conclusion. It would be preferable for the new State to be obliged to renew a reservation made by its predecessor if it felt that that was desirable. Such a procedure would strengthen the multilateral treaty and would also be in accordance with article 15, paragraph 2, which allowed a new State to make a new reservation to suit its own particular position at the time when it made its notification of succession.[216]

Canada. The Canadian delegation said that, as the Australian delegation had pointed out, it would be logical for the clean slate principle also to apply to article 15 and for the new State to be required to renew reservations of the predecessor State if it so wished: that would enable it to exercise the same options it was allowed in other circumstances and would also have the advantage of weighing the balance in favour of a less restrictive application of treaty relationships.[217]

Belgium. The Belgian delegation said that article 15 should, like the preceding articles, have been based on the clean slate principle and should have provided that the new State would have to renew the reservation made by the predecessor State if it intended to maintain it with respect to itself.[218]

Zambia. The Zambian delegation said that article 15 was a pragmatic and flexible approach to the question of reservations. In view of the reference to Zambia's notification of its succession to the Convention relating to the Status of Refugees, cited in the commentary on the article,[219] the Zambian delegation wished to re-state the position which it had adopted at the previous session of the General Assembly. This was that, when a new State gave notice to the depositary of its succession to a treaty and at the same time notified him of reservations of its own without alluding to those formulated by its predecessor, the new State was a party to the treaty in question by succession, although the terms of its participation had been modified by the formulation of new reservations which implicitly abandoned the predecessor State's reservations. To some extent, such a situation seemed analogous to the application of successive treaties relating to the same subject-matter where the provisions of the earlier treaty applied only to the extent that they were compatible with those of the later treaty. In any case, the Zambian delegation could not accept the Netherlands' proposal that reservations in respect of multilateral law-making conventions should not be automatically maintained.[220]

Venezuela. The delegation of Venezuela said that article 15, paragraph 3 (*a*), had been drafted by reference to the rules contained in the various articles of the Vienna Convention. Some members of the Commission had expressed doubts as to the advisability of that method and had thought that the rules in question should be reproduced. Venezuela had used the same method on numerous occasions in connexion with agreements and conventions of various kinds; it had achieved the purposes sought more surely and accurately. An agreement concluded between Venezuela and UNESCO in early 1972, for example, provided that, with regard to privileges and immunities, the relevant provisions of the Convention on the Privileges and Immunities of the Specialized Agencies should be followed—although Venezuela was still not a party to that Convention.[221]

Written comments

276. *Austria.* The Austrian Government commented, on paragraph 2 of article 15, that the idea embodied in the provision seemed to arise from a misunderstanding of the concept of succession. The Government said that a new State inherited conventions in precisely the same state in which they applied to its territorial predecessor and therefore inherited the latter's reservations. It might waive these reservations because that was also the right of its predecessor but it might not make new ones since its predecessor could not do so. If a newly independent State wished to make reservations it ought, in the view of the Austrian Government, to use the process of ratification or accession to become a party to the multilateral treaty.

Poland. The Government of the Polish People's Republic commented as follows:

> As far as the question of reservations and objections in the context of succession of the newly independent States is concerned, the Government of the Polish People's Republic feels that the clean slate principle should be applicable also to the succession in respect of reservations of the predecessor States. Since the act of succession in respect of a treaty itself is of a constitutive—and not declaratory—nature, it seems logical that it should be so treated in every respect—also in respect of the scope of the treaty covered by that act. Besides, in the case of the newly independent States formed of two or more territories (article 25), the present presumption in favour of automatic inheritance of the reservations could cause some difficulties; for instance, if the reservations applied to the different territories are not mutually reconcilable. Therefore, the presumption formulated in article 15, paragraph 1 of the draft should be reversed.
>
> The question of inheritance of objections has been completely omitted in the draft. In practice, however, a newly independent State on three occasions took clear positions with regard to objections of the predecessor States. Thus Barbados added a declaration to its notification of succession in respect of the 1949 Geneva Conventions on the Protection of War Victims, in which it submitted objections identical to those previously formulated by the United Kingdom.[222] Two other cases concern the Geneva Conventions on the Law of the Sea of 1958. Fiji and Tonga, while withdrawing an objection of the United Kingdom in respect of reservations of Indonesia, declared that they maintained all other objections.[223] Taking into account the acts presented above, it seems necessary to include in article 15 a provision providing that

[216] *Ibid.*, 1319th meeting, para. 4.

[217] *Ibid.*, 1324th meeting, para. 14.

[218] *Ibid.*, para. 24.

[219] Para. 10 of the commentary.

[220] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1326th meeting, para. 9.

[221] *Ibid.*, 1327th meeting, para. 24.

[222] United Nations, *Treaty Series*, vol. 653, p. 454; and *ibid.*, vol. 278, pp. 266-268.

[223] See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc., as at 31 December 1972* (United Nations publication, Sales No. E.73.V.7), pp. 398, 399, 404-406 and 412.

predecessor States' objections do not devolve upon the newly independent States unless expressly maintained in the notification of succession. In the opinion of the Government of the Polish People's Republic, supported by the practice quoted above, this is a correct presumption. The International Law Commission in its commentary [224] rightly points to a universal lack of interest on the part of the newly independent States in the maintaining of objections made by metropolitan States. The practice shows that metropolitan States made their objections, primarily, in pursuit of their own interests. It seems desirable to regulate the question of reservations and objections in two separate articles. One of them could deal with the predecessor States' reservations and objections and the other with new reservations and objections.

Sweden. The Swedish Government said that, in support of the provision in paragraph 2, the Commission stated that

> the Secretary-General is now treating a newly independent State as entitled to become a part to a treaty by "succession" to its predecessor's participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations.[225]

The Swedish Government commented that it hardly needed to be pointed out that it was not within the authority of a depositary to agree to reservations and that consequently the Secretary-General's practice could not be the basis of a rule of customary international law. Nor did the fact that parties to a treaty in individual cases had not protested against new reservations submitted by newly independent States necessarily mean that those parties recognized that there was a general right in favour of those new States to formulate their own reservations. Paragraph 2 must therefore be considered as a proposal *de lege ferenda.* As such it was not appropriate, because in general reservations were not desirable and practical reasons why additional ones should be allowed in this case were not apparent.

The Government continued by saying that article 15 included by reference the content of a number of articles, dealing with reservations, of the Vienna Convention. The Commission stated in the commentary that thereby Governments would be given an opportunity "to express their views on the whole question of drafting by reference in the context of codification".[226] As far as the present article was concerned, the reference method seemed justified as otherwise the article would have been very long and heavy and as the draft had a close connexion with the Vienna Convention. Regarding the general question of drafting by reference, it was not possible to give a positive or negative answer valid for all occasions. Reasons for and against varied both in kind and weight with circumstances and the decisions would have to be based on the situation in the particular case.

United Kingdom. The United Kingdom Government said, as regards paragraph 1 (*a*), that the test of compatibility between two reservations might be difficult to apply in practice. Formulation of a new reservation on the same subject as an existing one should imply an intention to replace the latter by the former. Thus the words "and is incompatible with the said reservation" might be omitted with advantage.

As regards paragraph 1 (*b*), a reservation which "must be considered as applicable only in relation to the predecessor State" could hardly be "applicable in respect of the territory in question at the date of the succession of States". Accordingly, paragraph 1 (*b*) was unnecessary.

In paragraph 2, a cross-reference might usefully be made to "the rules set out in article 19 of the Vienna Convention on the Law of Treaties" instead of repeating them *in extenso.*

United States of America. The United States Government commented as follows:

> An even more complicated timing problem arises in connexion with articles 15 and 16. Article 15 permits a new State at the time it notifies succession to withdraw reservations previously applicable to the territory concerned or, subject to certain limitations, to make new reservations. Any old reservation inconsistent with a new reservation is replaced by the new reservation. It is not clear whether the retroactive effect of article 18 applies to the varying situations dealt with in article 16. Certainly it would seem reasonable to consider that a reservation maintained in effect under the notification of succession should be considered as having remained in effect during the period between independence and notification if the treaty is considered in effect for that period. But to give a new reservation such retroactive effect would be quite another matter since it could lead to arbitrary and inequitable consequences that the other parties would be totally unable to guard against. Paragraph 3 of article 15 provides some protection in that the reference to article 20 of the Vienna Convention would presumably permit other States party to object to the reservation within 12 months from the date of notification. However, it is possible that the third State might have no objection to the reservation as such but would have objection to its being retroactive. Similar problems arise when the new reservation is inconsistent with an old reservation. The Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession.
>
> The right of the new State under paragraph 2 of article 16 to change the predecessor State's choice in respect of parts of the treaty or between differing provisions raises the same problems of uncertainty and possible prejudice, if the choice is given retroactive effect, as are raised by new reservations. Accordingly, such choice should have effect only from the notification of succession.
>
> The difficulties encountered with regard to articles 15 and 16 emphasize the need for establishing a time-limit within which the new State should notify succession.

Observations and proposals of the Special Rapporteur

277. At first sight the comments on article 15 seem to be long and complicated, but, when they are related to the paragraphs of the article which they affect, they fall naturally into place. Accordingly, the comments will be considered under the heading of the paragraphs affected.

Paragraph 1

278. The Australian, Belgian, Canadian and Polish comments advocate the reversal of the presumption in paragraph 1 so that the successor State, if it wishes to maintain any reservations made by the predecessor State, shall be required to state its intention to that effect at the time of the notification of succession. The Netherlands delegation, in effect, made the same suggestion but

[224] See para. 14 of the commentary to article 15.

[225] Para. 11 of the commentary to article 15.

[226] Para. 18 of the commentary to article 15.

limited it to multilateral treaties of a "law-making" character.

279. So far as the suggestion of the Netherlands delegation is concerned, the decision of the Commission would largely depend on whether it decided to establish a separate category of "law-making" treaties for the purposes of article 12. In that connexion, reference may be made to the considerations stated above.[227] If the Commission decided not to establish a separate category of "law-making" treaties for the purposes of article 12, to do so for the purposes of article 15, paragraph 1, would introduce complications and additions to the draft that would be difficult to justify. In these circumstances, while appreciating the intrinsic merits of the suggestion made by the Netherlands delegation, the Special Rapporteur will leave it on one side for the time being.

280. The arguments in support of the reversal of the presumption in paragraph 1 of article 15 may be summarized as follows. First and foremost, the requirement that a reservation, if it is to be maintained, must be renewed by the successor State would be (so it is said) more consistent with the clean slate principle. Secondly, (according to the Polish Government) since the act of succession in respect of a treaty is of a constitutive—and not a declaratory—nature, it would be logical to treat it as such with respect to reservations as well as with respect to the treaty itself. Thirdly, reversal of the presumption in paragraph 1 would be more consistent with paragraph 2 of article 15 which would allow a newly independent State to make new reservations at the time of making its notification of succession to a treaty. Fourthly, the requirement of renewal would strengthen multilateral treaties by compelling newly independent States to make a positive decision if they wish to maintain any reservations made by a predecessor State.

281. The first and second of these arguments may be taken together. They are both based on the nature of the option given to newly independent States on the basis of what has more accurately been called the clean slate metaphor. It is convenient to speak of the clean slate principle but this expression should be understood not so much as an absolute principle in itself as shorthand for the principle stated in article 11 of the draft read with articles 12 and 13. As is clear both from the text of those articles and from the commentaries, they are concerned with the question of the inheritance by a newly independent State of the treaties of its predecessor State and this refers to the rights and obligations of the predecessor State under such treaties as they applied to the territory of the newly independent State at the date of the succession of States. The choice of the newly independent State is either to succeed or not to succeed to such treaties. As stated in the commentary to article 15,

> Whenever a newly independent State is to be considered as a party to a multilateral treaty, under the law of succession, pure logic would seem to require that it should step into the shoes of its predecessor under the treaty in all respects *as at the date of the succession.* In other words, the successor State should inherit the reservations, acceptances and objections exactly as they stood at the date of succession.[228]

Logically, this seems to be the right answer to the arguments based on a "logical" extension of the clean slate principle to reservations.

282. This conclusion also seems to be in accord with the effect of a reservation established with regard to another party in accordance with articles 19, 20 and 23 of the Vienna Convention, which, by virtue of the provisions of article 21 of the Convention, modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation. If there is succession in respect of a treaty to which there is a reservation, it is logical that it should be succession to the treaty as modified by the reservation in accordance with article 21 of the Vienna Convention. The newly independent State would, of course, be left free to withdraw the reservation if it wished to do so, but the right of withdrawal would exist for that State as an incident of the general law relating to treaties and not as an incident of the succession.

283. So far as the third argument is concerned, it is difficult to see why the grant of an additional right to make new reservations should imply an obligation to give notice of the maintenance of existing reservations. There does not appear to be any inconsistency in saying to a newly independent State, "You will have the benefit of any existing reservations, unless you wish to withdraw them, and you may also add new reservations if you wish to do so." Nor does there appear to be any greater consistency in saying, to the newly independent State, "You will only have the benefit of existing reservations if you express an intention to maintain them when you make your notification of succession, but you may make new reservations if you wish to do so." The argument of consistency between the provisions of paragraphs 1 and 2 does not have much force one way or the other.

284. Finally, there is the argument that the requirement of renewal would strengthen multilateral treaties by compelling newly independent States to make a positive decision if they wish to maintain existing reservations. Again, this argument does not seem to have much force one way or the other. So far as the requirement might encourage the implicit withdrawal of reservations it would perhaps tend to "strengthen multilateral treaties", but so far as it might discourage newly independent States from making a notification of succession it would have the opposite effect. It is impossible to forecast which tendency would be likely to prevail in particular cases.

285. From the point of view of the newly independent State, the present presumption in favour of the maintenance of reservations is probably less onerous than the reverse presumption would be.

286. In the light of the foregoing considerations and of the reasons given in the commentary, the Special Rapporteur has come to the conclusion that the pre-

[227] See paras. 221-229 above, under article 12.

[228] Para. 2 of the commentary.

sumption in paragraph 1 should be maintained and not be reversed.

287. Apart from the major change in paragraph 1 discussed in the above paragraphs, two minor changes to paragraph 1 have been suggested. The first, made by Zambia and the United Kingdom, is to the effect that formulation of new reservations to a multilateral treaty by a newly independent State when making its notification of succession should be regarded as implying withdrawal of any existing reservation which relates to the same subject matter. Perhaps Zambia would frame the proposition more broadly in the sense that the formulation of any new reservations to a treaty should be regarded as implicit withdrawal of all the old reservations. In that form, the proposition would be too broad and would be difficult to justify logically. In its narrower form as stated above, the proposition seems to be fair and reasonable and would make the application of paragraph 1 (*a*) more certain by avoiding the necessity of a judgment as to the compatibility between the old and the new reservation. The change could be effected by deleting from paragraph 1 (*a*) the words "and is incompatible with the said reservation". It would, of course, be open to the newly independent State when formulating its new reservation to incorporate the old one. This procedure would also have the advantage of helping towards clarity and certainty. For these reasons, the Special Rapporteur supports this suggestion.

288. The second minor change is one suggested by the United Kingdom Government. It is the deletion of paragraph 1 (*b*). Since paragraph 1 only applies to a reservation "which was applicable in respect of the territory in question at the date of the succession of States", it is unnecessary and confusing to provide expressly in sub-paragraph (*b*) for the exclusion of a category of reservations which by hypothesis would not be applicable in respect of that territory. Accordingly, the Special Rapporteur also supports this suggestion.

289. Finally, the Polish Government has made a suggestion concerning objections to reservations which is related to paragraph 1 of article 15. It is that there should be a presumption that the predecessor State's objections do not devolve upon the newly independent State unless expressly maintained in the notification of succession. Although linked to the suggestion that the presumption in favour of the maintenance of reservations should be reversed, the suggestion that there should be a presumption against the maintenance of objections is not necessarily dependent on the former suggestion. Nevertheless, on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft. If an objection has been made by a predecessor State so as to prevent the entry into force of the treaty between that State and the reserving State, as a matter of succession that is the legal position that will be inherited by the successor State. On the other hand, it will as a matter of customary international law or under article 22, paragraph 2, of the Vienna Convention, always be open to the successor State to withdraw the objection if it wishes to do so. In these circumstances, there seems to be no need to complicate the draft by making express provisions with respect to objections.

290. Having regard to the foregoing considerations and certain minor points of drafting, the Special Rapporteur proposes that paragraph 1 of article 15 be redrafted as follows:

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation **to that treaty** * which was applicable in respect of the territory in question at the date of the succession of States unless, **when making the notification of succession,*** it expresses a contrary intention or formulates a new reservation which relates to the same subject matter **as that reservation.***

Paragraph 2

291. The Austrian and Swedish Governments have commented to the effect that the grant of a right to make new reservations when notifying succession to a treaty is not consistent with the nature of succession, is not adequately supported by practice and is not justified by practical reasons.

292. As a matter of principle, the comments of these Governments are well-founded. Indeed, one may add that paragraph 2 goes beyond the provisions of article 19 of the Vienna Convention, which only permits reservations to be formulated by a State "when signing, ratifying, accepting, approving or acceding to a treaty". Obviously, these occasions do not include "making a notification of succession to a treaty".

293. The real issue here is whether there are sufficient practical reasons for granting the right to make new reservations to a newly independent State. This is perhaps a question to be answered by Governments when casting the draft articles in the form of a convention. Meanwhile, it may be observed that paragraph 2 has not attracted widespread opposition from delegations or Governments. On the contrary, it has by implication received considerable support. In this connexion, one may refer, for example, to the comments of the Australian delegation and those of the United Kingdom and United States Governments. In support of paragraph 2, it may also be said that none of the occasions mentioned in article 19 of the Vienna Convention is available to a newly independent State which for any reason wishes to establish its status as a party or a contracting State to a multilateral treaty by way of succession. The notification of succession is, for a newly independent State, the only occasion which approximates to the occasions mentioned in article 19 of the Vienna Convention and which may provide an opportunity for it to make reservations which seem to be necessary or desirable in its new condition of independence.

294. Having regard to the points made in the commentary to article 15 [229] and the above considerations, it seems to the Special Rapporteur that there are sufficient practical reasons for maintaining paragraph 2 in the draft.

* Words in **bold type** replacements for or additions to the original draft.

[229] Para. 17.

295. The United Kingdom Government, however, has suggested that paragraph 2 might be drafted by reference to the Vienna Convention like paragraph 3 without restating the provisions contained in article 19 of the Convention. On the assumption that drafting by reference to the Convention is acceptable for the purposes of paragraph 3 (which it appears to be) it seems to be sensible to use the same method for the purposes of paragraph 2.

296. Having regard to the above considerations, the Special Rapporteur proposes the following redraft of paragraph 2:

2. When **making a notification of succession** * establishing its status as a party or as a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless **the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (*a*), (*b*) or (*c*) of article 19 of the Vienna Convention on the Law of Treaties.***

Paragraphs 2 and 3

297. The United States Government has suggested that it should be made clear in article 15 that a new reservation made on notification of succession should not operate retroactively. This suggestion is related to the possibility of delay in the making of a notification, but, even if a time-limit of say three years is imposed for the purposes of a notification of succession under article 12 or 13, there is no apparent reason why a new reservation should be made retroactive. The present draft of articles 15 and 18 may be sufficient as they stand because there is nothing in either article to suggest that a *new* reservation would have retroactive effect. Nevertheless, if a suitable form of words can be found it may be wise to cover the point expressly. This might be done by the addition of a fourth paragraph to article 15.

298. To assist the Commission in the consideration of this point, the Special Rapporteur proposes the following additional paragraph:

4. **A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession.**

Article 16. Consent to be bound by part of a treaty and choice between differing provisions

Comments of Governments

Oral comments

299. *Australia.* The Australian delegation took a position with respect to article 16 similar to that taken on article 15.[230]

Written comments

300. *Sweden.* The Swedish Government said that, as with the right to form new reservations, it seemed exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions.

United Kingdom. The United Kingdom Government said, with regard to paragraph 3, that once a newly independent State had established its status as a party it had all the rights and obligations of a party. Thus the need for this paragraph was doubtful.

United States of America. (See the comments under article 15 above.) [231]

Observations and proposals of the Special Rapporteur

301. Again it is convenient to deal with the comments under the paragraphs to which they relate.

Paragraph 1

302. As in the case of paragraph 1 of article 15, the Australian delegation has suggested the reversal of the presumption in paragraph 1 of article 16. Here, however, there would be even less justification for the reversal and, in the view of the Special Rapporteur, the paragraph should be maintained as it stands. This is clearly in accordance with the principle that the newly independent State, which makes a notification of succession, inherits a treaty as it stands at the date of the succession of States subject to such additional choice as may be conferred on it.

Paragraph 2

303. The Swedish Government considers that it is exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions. As in the case of paragraph 2 of article 15, the decision whether to retain paragraph 2 of article 16 turns on practical considerations rather than on points of principle. To the Special Rapporteur it does not seem unreasonable to allow a newly independent State to exercice its own choice having regard to the circumstances in which it finds itself after independence. Accordingly, he proposes that paragraph 2 be retained.

304. If the paragraph is retained, the question arises whether, as suggested by the United States Government, it should be made clear that any choice declared under the paragraph does not operate retroactively. It might be wise to clarify the point. This could be done by redrafting paragraph 2 as follows:

2. When so establishing its status as a party or as a contracting State, a newly independent State may, **with effect from the date of the making of the notification of succession,*** declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

Paragraph 3

305. The United Kingdom Government doubts the need for paragraph 3. However, it may be advisable to

* Words in **bold type** are replacements for or additions to the original draft.

[230] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee,* 1319th meeting, para. 4. See also para. 275 above, under article 15.

[231] See para. 276 above.

* Words in **bold type** are replacements for or additions to the original draft.

retain the paragraph to avoid any implication from paragraph 1 that a newly independent State would be deprived of the right to withdraw or modify a choice made with respect to its territory. If so, as a matter of drafting, it would seem that the phrase "any such choice" at the end of the paragraph should be amended to read "any such *consent or* choice".

306. As regards the comments of the United States Government, there does not seem to be any need to provide against the retroactive effect of a withdrawal or modification under paragraph 3 because it would clearly be in exercise of a "right provided for in the treaty". This surely could not attract the retroactive effect for which article 18 provides.

Article 17. Notification of succession

Comments of Governments

307. No comments were made by delegations or Governments.

Observations and proposals of the Special Rapporteur

308. Subject to a few minor points of drafting which it would be inappropriate to raise in the present report, the Special Rapporteur has no observations to make on article 17.

Article 18. Effects of a notification of succession

Comments of Governments

Oral comments

309. *Israel.* The delegation of Israel said that it was essential for the Commission to give further consideration to the implication of the time factor for the topic as a whole and the proper formulation of all the draft articles and their commentaries to encompass that factor. In paragraph 41 of the report on its twenty-fourth session . . . there was a reference that seemed to be to the "temporal element" as an outward-looking factor in relation to the date on which the codification of the topic should be completed. However, the delegation said there was an inward-looking aspect of the time factor, namely the temporal conflict element in a rule such as those found in articles 18 or 19. In that text, time was a substantive matter of major importance. The so-called "intertemporal law" was an elusive topic: it had caused the Commission difficulties in the past and the Commission might look more deeply into the question.[232]

Written comments

310. *Sweden.* The Swedish Government said that a provision that a newly independent State in its notification of succession might specify a date for its adherence later than the date of the succession of States hardly seemed justified, as it would introduce another element of uncertainty in treaty relations.

United Kingdom. The United Kingdom said that where a newly independent State made a notification of succession some considerable time after independence, other States might, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question was not dealt with in the Commission's proposals. As regards paragraph 2 (*b*), the Government said that it should be possible for all the parties to agree on a later date in all cases and not merely in those falling under article 12, paragraph 3.

United States of America. The United States Government commented as follows:

> Article 18 provides that a newly independent State which submits a notification of succession is considered as a party to the treaty as of the date of receipt thereof, but that the treaty is considered as being in force between the parties from the date of succession. The commentary states that this application of the principle of continuity is supported by practice although States have deviated from the rule in relation to certain successions and treaties. The United States accepts the principle as a logical corollary to the theory of succession but considers that it may raise some difficult problems in application. For example, a new State is established. A dispute between private individuals develops which includes as a major issue whether a multilateral agreement applicable to the territory prior to independence remains in force within the new State. No notification of succession having been given by the new State, the court decides the case on the basis that the treaty is inapplicable. Thereafter, the new State deposits a notice of succession to the treaty. What effect, if any, does bringing the treaty into effect retroactively have upon the judgement? Is the judgement open to collateral attack? Is the situation affected by whether the time for appeal has expired and no appeal has been taken; by whether an appeal is pending? Is it equitable to make provision in the articles for reopening a final decision in such a case? If so, what of settlements agreed between the parties, whether or not approved by a court, based on the assumption that the treaty was inapplicable?
>
> This set of problems is further complicated by the factor that in authorizing the new State to make a declaration of succession, *article 12* does not contain any limitation as to time.

Observations and proposals of the Special Rapporteur

311. All the comments relate to the time element involved in paragraph 2 of article 18. This involves difficult questions that merit further consideration on the part of the Commission. The hypothesis of continuity based on the concept of succession when a newly independent State establishes its status as a party or contracting State to a multilateral treaty under article 12 or 13 is not challenged in any of the comments. The main problem is the hardship for other States parties to a multilateral treaty that may arise as a result of the uncertainty whether in a particular case the treaty is to be regarded by them as in force in respect of the newly independent State between the date of the succession of States and the date of the making of the notification of succession (if any).

[232] *Official Records of the General Assembly, Twenty-eighth Session, Sixth Committee*, 1404th meeting, para. 11.

312. It should be noted, however, that both the United Kingdom and United States comments, which give examples, are based on the view that between the succession of States and the notification another State party is entitled to act on the assumption that the treaty is not in force between itself and the newly independent State. That may be the effect of the present draft articles. The point is not covered expressly but it appears to be the right interpretation having regard to the requirement of the agreement of the other State party to provisional application of a multilateral treaty under article 22.

313. On the other hand, it would be possible, at least in theory, to provide that the other State party should continue to be bound by the treaty in respect of the newly independent State until the latter made a notification of succession or declared its intention not to do so. Such a solution would, of course, be inequitable in the sense that during the intervening period the other State party would be bound in any event, but the newly independent State would not be bound unless it made a notification of succession. While it would remove an element of uncertainty, it would not otherwise alleviate the hardship of other States. It would also be inconsistent with the provisions of article 22 as at present drafted.

314. Again it would in theory be possible to provide that another State party should not be regarded as bound by a treaty in its relations with a newly independent State pending a notification (unless there is agreement for provisional application under article 22). Such a provision, however, would either be inconsistent with the retroactive effect of a notification of succession, or, if the retroactive effect of a notification were retained, it would be a delusion that would not in fact improve the lot of the other State party. Much the same remarks may be made about the idea that another State party should not be held responsible for a breach of the treaty vis-à-vis the newly independent State committed during the period between the succession of States and the making of the notification of succession. Accordingly, the Special Rapporteur does not feel able to advise the Commission to adopt a solution on these lines.

315. Problems of the kind mentioned in the comments on article 18 were considered in some detail by the Commission on 30 and 31 May 1972 in connexion with what was then draft article 12.[233] It was pointed out that what is now paragraph 2 of article 18 reflected the practice of the United Nations Secretariat and that the recognition of the retroactive effect of a notification of succession did not appear in fact to have given rise to cases of serious hardship for other States parties to a multilateral treaty. Nevertheless, the possibility of hardship was considered and taken into account. It was also recognized that the apparent inequality between the newly independent State and another State party might be ameliorated by the imposition of a time-limit on the period allowed for making a notification of succession. When draft article 12 was referred to the Drafting Committee, the question of fixing a time-limit was left in abeyance, but when the draft article was submitted to the Commission by the Chairman of the Drafting Committee there was no further discussion of the question.[234]

316. Provision for a time-limit might be made by amending articles 12 and 13 as indicated above,[235] or perhaps by amending article 18. However, pending a clarification of views in the Commission, it would be fruitless to suggest further alternative amendments. Nevertheless, it is apparent that the incorporation of a time-limit for the making of a notification of succession would make the position much more manageable for the other State party. In the absence of any other satisfactory solution which may be regarded as consistent with practice and the concept of succession underlying the draft, the Special Rapporteur suggests that the Commission should give careful consideration to the idea of making provision for such a time-limit in the draft articles.

317. It remains to consider the specific suggestions made by the Swedish and United Kingdom Governments. In effect, the Swedish Government has suggested the deletion of sub-paragraph (*c*) of paragraph 2 which gives the newly independent State the right to choose a date later than the succession of States for the entry into force of the treaty. The reason given is that this provision "would introduce another element of uncertainty in treaty relations". At first sight it may appear that this criticism is justified, but on reflection this does not seem to be so. The provision in fact would not introduce a new element into the liberty already exercised by newly independent States, nor is it intrinsically unreasonable that, if the newly independent State may require retroactive effect for its notification of succession back to the date of the succession of States, it may choose to do so for some shorter period. Accordingly, the Special Rapporteur does not propose adoption of the Swedish Government's suggestion.

318. The United Kingdom Government has suggested, as regards paragraph 2 (*b*), that it should be possible for all the parties to agree on a later date in all cases and not merely in those falling under article 12, paragraph 3. It seems to the Special Rapporteur, however, that this suggestion is based on some misunderstanding of the purpose of paragraph 2 (*b*) and the effect of paragraph 2 as a whole. Paragraph 2 (*b*) has the effect of excluding, in cases falling under article 12, paragraph 3, the option of the newly independent State to specify a later date which it would otherwise have under paragraph 2 (*c*). This is necessary because of the provisions of article 12, paragraph 3, with respect to "restricted" multilateral treaties. In the view of the Special Rapporteur the same necessity does not arise in the case of multilateral treaties which are not "restricted".

319. In the light of the above considerations, the Special Rapporteur proposes that the Commission should approve draft article 18 with the possible addition of a time-limit on the period within which a notification of succession may be made. If such addition is to be made, he would

[233] For the Commission's discussion of the draft article, See *Yearbook . . . 1972*, vol. I, pp. 103 *et seq.*, 1168th meeting, paras. 58-93 and 1169th meeting.

[234] *Ibid.*, p. 267, 1196th meeting, paras. 3-6.

[235] See paras. 230-238 above.

propose that it be done by amendment to articles 12 and 13 in the way already suggested.[236]

SECTION 3. BILATERAL TREATIES

Article 19. Conditions under which a treaty is considered as being in force

Comments of Governments

Oral comments

320. *United States of America.* As an illustration of a rule which made a highly favourable first impression, said the United States delegation, was article 19, under which the consent of both States was required for a bilateral treaty to be considered as being in force. That article articulated a rule which the United States Government had followed since the Second World War in its role as a depositary.[237]

Australia. Citing the general rule with respect to bilateral treaties expressed in article 19, the Australian delegation pointed out that it reflected the existing rule of international customary law, namely that a State could be bound by a treaty only if it consented thereto.[238]

Finland. The Finnish delegation said that the rules set forth in article 19 were pertinent and accorded with State practice, but it would be desirable to specify, in paragraph 2, the exact date on which succession took effect.[239]

Canada. The Canadian delegation said that the draft articles on bilateral treaties—articles 19, 20 and 21—were in accord with the Canadian position on the question as indicated in the passage quoted in the commentary[240] to article 19.[241]

Zambia. The delegation of Zambia attached due significance to the provision whereby newly independent States might obtain the continuance in force of bilateral treaties by express or tacit agreement.[242]

Byelorussian SSR. The Byelorussian delegation said that article 19, paragraph 1 (*b*) might well give rise to conflicts which would be difficult to settle, where a successor State deemed that it had expressed its agreement by its conduct while the other party did not consider that its behaviour was a proof that succession had occurred. It would be preferable to envisage an obligation of notification for the successor State.[243]

Written comments

321. *Sweden.* The Swedish Government referred to its comments under article 12 regarding a time-limit.[244]

United Kingdom. The United Kingdom Government said that too much had been read into the italicized words in the quotation made in the commentary[245] with reference to United Kingdom practice. The qualification of the United Kingdom reply had been dictated by the need not to interfere in the external affairs of newly independent countries. The purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 was not clear. Paragraph 1 (*b*) appeared to be concerned with tacit agreement by conduct.

Observations and proposals of the Special Rapporteur

322. This article appears to be generally acceptable.

323. The Swedish Government, however, has raised the question whether a time-limit should be provided for article 19 for the reasons adduced with respect to article 12. The legal position is, however, different in the case of the two articles. Article 12 gives a unilateral right of notification of succession which, if made, will affect the rights and obligations of other States. Article 19, on the other hand, leaves the treaty relationship to be determined by express or tacit agreement. In these circumstances, there does not seem to be any need for a time-limit.

324. The Byelorussian delegation has suggested that it would be better to provide for a notification of succession by the successor State rather than to provide for tacit agreement to continue bilateral agreements. This suggestion would involve deletion of paragraph 1 (*b*) and the amendment of the main provision of paragraph 1 by the substitution of a provision for notification of succession by the successor State for the continuation of bilateral agreements by agreement between the newly independent State and the other State party. The reason given in support of this change is the difficulty of determining when there is a tacit agreement for the purposes of paragraph 1. While recognizing the risk of difficulty in making this determination in particular cases, it does not seem that the risk is sufficiently great to justify changing the principle of the paragraphs which is based on consent. On the other hand, practice and convenience are in favour of the continuation of bilateral treaties by agreement made either expressly or by conduct. Accordingly, the Special Rapporteur proposes that paragraph 1 should be retained including both sub-paragraphs.

325. Having regard to the provision for continuation by tacit agreement made in sub-paragraph (*b*), the United Kingdom Government have questioned the inclusion of the words "in conformity with the provisions of the treaty" in the first part of paragraph 1. This is, of course, a question of drafting, but it is not clear whether the words are referring to the substantive provisions or to the formal clauses in the treaty. In either case, they seem to be unnecessary and might be deleted.

326. The Finnish delegation suggested that paragraph 2 should specify the exact date on which succession took effect. While certainty is desirable, if continuation of a bilateral treaty is to be by agreement as provided in paragraph 1, it follows naturally that the date from which

[236] See paras. 234 and 263 above.

[237] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1318th meeting, para. 18.

[238] *Ibid.*, 1319th meeting, para. 5.

[239] *Ibid.*, 1320th meeting, para. 3.

[240] Para. 11 of the commentary.

[241] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 15.

[242] *Ibid.*, 1326th meeting, para. 6.

[243] *Ibid.*, para. 41.

[244] See para. 219 above.

[245] Para. 11.

the treaty is to be considered as in force should also be determined by agreement. This is, in effect, what paragraph 2 provides, although, as under paragraph 1, the agreement may be express ro implied. Accordingly, the Special Rapporteur proposes that paragraph 2 should be retained substantially as it is in the draft articles.

Article 20. The position as between the predecessor and the successor State

Comments of Governments

Oral comments

327. *Australia.* The Australian delegation said that articles 20 and 21, like article 19, also gave effect to the basic principle of international customary law that a State could be bound by a treaty only if it consented thereto.[246]

Finland. By contrast with article 19, the Finnish delegation said that the *raison d'être* of articles 20 and 21, which dealt with the position as between the predecessor and the successor State and the effects of an act of the predecessor State performed after the date of succession on the treaty relations of the successor State was questionable, because those articles were merely statements of fact.[247]

Canada.[248]

Observations and proposals of the Special Rapporteur

328. The comments on article 20 are sparse and contradictory. The Finnish delegation questioned the need for the article because it was no more than a statement of fact. On the other hand, the Australian and Canadian delegations supported the article on the ground that it was in accord with current law and practice. In the view of the Special Rapporteur, although the rule formulated in the article may be self-evident, it is a useful clarification which points out the distinction between multilateral and bilateral treaties. In the case of a multilateral treaty to which the predecessor State remains a party, treaty relations will be established between that State and the newly independent State when the latter makes a notification of succession. In the case of a bilateral treaty, this will not be so. The result of continuation under article 19 will not be the creation of a tripartite treaty but, in effect, two bilateral treaties—one between the predecessor State and the other State party (which normally will continue notwithstanding the succession of States) and another between the successor State and the other State party. The succession of States will not result in the creation of relations with respect to the bilateral treaty between the successor and predecessor States. This proposition, which is embodied in the article, accords with practice. For these reasons, in the view of the Special Rapporteur, article 20 should be retained.

[246] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1319th meeting, para. 5.

[247] *Ibid.*, 1320th meeting, para. 3.

[248] See para. 320 above, under article 19.

Article 21. Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

Comments of Governments

Oral comments

329. *Australia.*[249]

Finland.[250]

Canada.[251]

Written comments

330. *Poland.*[252]

United Kingdom. The United Kingdom Government said that paragraphs 2 and 3 of the article appeared to re-state the rules in paragraph 1 and that the drafting of the article could probably be much simplified.

Observations and proposals of the Special Rapporteur

331. The comments on article 21 are also sparse and contradictory. The same delegations have expressed the same attitudes as in the case of article 20, but the Polish Government, by suggesting parallel provisions in the cases of multilateral treaties, has by implication given its support to article 21.

332. It seems to the Special Rapporteur that article 21 deals with points on which clarification and certainty are desirable. Accordingly, he proposes that it should be retained.

333. On the other hand, the article is long and repetitive and, as the United Kingdom Government have suggested, it should, if possible, be shortened and simplified. It may be noted, however, that paragraphs 2 and 3 do not deal with exactly the same situations as paragraph 1, and simplification may prove more difficult than might be imagined at first sight. But the United Kingdom Government's comments raise only questions of drafting and do not call for any substantive decision by the Commission.

SECTION 4. PROVISIONAL APPLICATION

Article 22. Multilateral treaties

Comments of Governments

Oral comments

334. *Spain.* The Spanish delegation commented on the involved wording of paragraph 2 of article 22.[253]

Sweden. The Swedish delegation said that the Commission itself seemed to be aware of the unsettled situation which would be created by applying the clean slate

[249] See para. 327 above, under article 20.

[250] *Ibid.*

[251] See para. 320 above, under article 19.

[252] See para. 219 above, under article 12.

[253] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 25.

doctrine inasmuch as it suggested in draft articles 22 to 24 supplementary rules for the provisional application of treaties of the predecessor State.[254]

Written comments

335. *Sweden.* The Swedish Government, commenting on articles 22 to 24, said that the provisions regarding "provisional application" seemed to be needed to correct practical inconveniences of the clean slate doctrine. As formulated, they led to additional inequality between the States concerned. A newly independent State would be committed to provisional application of a multilateral treaty only after it had made a formal notification to that effect. While a State party to the treaty would be so committed also "by reason of its conduct". The justification of that difference was not apparent.

The Government added that the interpretation of the phrase "by reason of its conduct" in particular cases in regard to both multilateral and bilateral treaties was apt to cause difficulties and disputes.

The Government again pointed out that the complications of provisional application would be avoided in the alternative model referred to earlier in its comments.[255]

United Kingdom. The United Kingdom Government said that the term "successor State" appeared in article 22 (and articles 23 and 24) although the articles were in part III on "newly independent States". Reference should be made to the "predecessor State" as well as to "another State party"; in contrast to the position under article 19, a multilateral treaty could of course be applied provisionally between the successor State and the predecessor State. More generally, said the Government, the proposals, as drafted, appeared to permit a newly independent State to pick and choose between the existing parties to a treaty. The desirability of such discrimination was open to question, especially when it was not permitted under the general law on multilateral treaties. It could lead to different "schools" of States within a single treaty system. The commentary indicated that a right of choice was not intended. The notifications referred to had been made, in the case of declarations, to the United Nations Secretary-General rather than to individual States parties to or depositaries of particular treaties.[256]

Observations and proposals of the Special Rapporteur

336. The only general comments on provisional application are those of the Swedish delegation and the Swedish Government. In reality, these comments are criticisms of the clean slate doctrine on the grounds that, if the opposite approach were adopted, the articles on provisional application would be unnecessary, and that the articles themselves introduce an additional element of inequality. In connexion with the first of these two grounds, reference should be made to an earlier passage in the present report where the Swedish Government's criticisms of the clean slate principle are set out and it is proposed by the Special Rapporteur that the Commission should not attempt the preparation of an alternative set of draft articles at its twenty-sixth session.[257] On the assumption that the views of the Commission will accord with that proposal, the point requires no further examination here. Nevertheless, it may be noted that provisional application could do much to avoid inconvenience or hardship that might result from the application of the clean slate principle. Having regard to the practical value of articles 22 to 24 on provisional application, it is not surprising that there has not been any opposition to their inclusion in the draft. The Swedish Government's complaint of "inequality" is directed to the formulation of these draft articles and is more conveniently considered, together with the other comments, under the headings of the relevant paragraphs of the draft articles.

Paragraph 1

337. The Swedish Government has criticized the words "by reason of its conduct" on the ground that they introduce inequality into the draft because the newly independent State will only be committed to provisional application by formal notification while the other State party may be committed by its conduct. There does not, however, seem to be any real inequality here. It is more a matter of providing the most satisfactory procedure and it is difficult to imagine a multilateral treaty being accepted as applicable simply by the conduct of the newly independent State and another State party to the treaty. A minimum in the interests of certainty seems to be a requirement of express notification by the newly independent State. However, once notification has been made, the basis for provisional application is clearly laid, and conduct on the part of the other State party may well be sufficient to establish its agreement to provisional application. The Swedish Government has also criticized the phrase "by reason of its conduct" on the ground that its application in particular cases might cause difficulties and disputes. It is obvious that the words do involve that kind of risk, but it is sometimes convenient for States to accept a treaty relationship by conduct rather than by express notification. This may be so particularly in cases of provisional application. Therefore, it would seem wiser, at the present stage, in spite of the difficulties mentioned by the Swedish Government, to retain the words "or by reason of its conduct is to be considered as having so agreed". If the words are not wanted, they can easily be deleted when the draft articles are converted into a convention.

338. The United Kingdom Government have suggested that the expression "newly independent State" should be used instead of "successor State" as in the other articles in part III of the draft. This change would make the drafting of article 22 consistent with the drafting of the earlier articles in part III.

339. The United Kingdom Government have also suggested that, in the case of multilateral treaties, pro-

[254] *Ibid., Twenty-eighth Session, Sixth Committee,* 1398th meeting, para. 16.

[255] See paras. 27, 29 and 30 above.

[256] See paras. 3 and 5 of the commentary.

[257] See para. 30 above.

visional application should be possible between the newly independent State and the predecessor State, but this possibility is excluded by the use of the term "another State party" which by definition excludes the "predecessor State". There is here a difference between multilateral and bilateral treaties. In the case of the former (unlike the latter), the succession of States may lead to the establishment of treaty relationships between the newly independent State and the predecessor State. In the ordinary course of events, when a notification of succession to a multilateral treaty is made, both States will be parties to the treaty. Therefore, it would seem to be logical that provisional application of the treaty should also be possible between the newly independent State and the predecessor State. Accordingly, the Special Rapporteur proposes that paragraph 1 of article 22 should be amended so as to cover that case.

340. The United Kingdom Government further commented to the effect that paragraph 1 appeared to permit a newly independent State to pick and choose between the existing parties to a treaty. The wording of the paragraph might be open to that interpretation and the intention is not made very clear by the commentary.[258] However, such an interpretation would be contrary to the principle applied in articles 12 and 13, where no such freedom of choice is allowed, and cannot have been intended when paragraph 1 was drafted. Accordingly, the Special Rapporteur proposes that the drafting of paragraph 1 should be adjusted so as to make the intention clear. It might be sufficient for this purpose to amend the words "its wish that the treaty should be so applied" to read "its wish that the treaty should be applied provisionally", but some further redrafting might improve the article.

Paragraph 2

341. The Spanish delegation has commented on the involved wording of *inter alia* paragraph 2 of article 22, but this is a criticism, not so much of the drafting of that paragraph, as of the classification of treaties for the purposes of articles 12 and 13. As regards that classification, it is unnecessary to add here to the observations made above in connexion with those articles.[259] The drafting of paragraph 2 is not in itself "involved" and would not be simplified by the addition of further classes of multilateral treaties. On the other hand, the relationship between paragraph 2 and paragraph 1 is not as clear as it might be. For example, it is not made clear whether the procedure by notification applies in the case of "a treaty which falls under article 12, paragraph 3". The meaning might be made clearer by combining the two paragraphs of article 22 and by some rewording of what is now paragraph 2.

342. In the light of the above considerations, the Special Rapporteur proposes that article 22 be redrafted as follows:

If at the date of a succession of States a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State notifies the parties or the depositary of its wish that the treaty should be applied provisionally, the treaty shall so apply

(*a*) in the case of a treaty which falls under article 12, paragraph 3, in the relations between the newly independent State and the parties if all the parties consent to such provisional application, or

(*b*) in the case of any other multilateral treaty, in the relations between the newly independent State and any party to the treaty if the party expressly agrees or by reason of its conduct is considered as having agreed to such provisional application.

Article 23. Bilateral treaties

Comments of Governments

Oral comments

343. *Zambia.* The Zambian delegation said that, if treaty relations between a newly independent State and another State party were to continue in force, the latter must accept, tacitly at least, the provisional application of the treaty. A unilateral declaration and the acceptance, express or tacit by the other State party had been used by the Zambian Government as a provisional method for maintaining most of its treaty relationships. It had preferred that procedure to negotiating the express revival of a lapsed treaty or a new treaty to replace it. The Zambian Government therefore was entirely satisfied with the provisions of article 23, which embodied its own practice.[260]

Written comments

344. *Sweden.*[261]

United Kingdom.[262]

Observations and proposals of the Special Rapporteur

345. So far as the comments on article 23 are the same as those on article 22 it is unnecessary to repeat the observations made on the latter article. It may, however, be observed that the comments of the Zambian delegation tend to confirm the utility of the provision for agreement by conduct which is made in sub-paragraph (*b*) of article 23.

346. In accordance with the suggestion of the United Kingdom Government, it would be appropriate to substitute the term "the newly independent State" for "the successor State" in article 23.

Article 24. Termination of provisional application

Comments of Governments

Oral comments

347. *Spain.* The Spanish delegation commented on the involved wording of paragraph 1 (*c*) of article 24.[263]

[258] Para. 3 of the commentary.

[259] See paras. 221-229 above.

[260] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1326th meeting, para. 7.

[261] See para. 335 above, under article 22.

[262] *Ibid.*

[263] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 25.

Written comments

348. *Sweden.*[264]

United Kingdom.[265]

Observations and proposals of the Special Rapporteur

349. To save repetition, reference is here made to the observations under article 22 with regard to the comments of the Swedish Government, the United Kingdom Government and the Spanish Government.[266]

350. For the reasons indicated in connexion with article 22, it would seem right for the purposes of article 24 to substitute the expression "the newly independent State" for "the successor State" and, in the case of multilateral treaties, to avoid the use of the expression "the other State party" which appears in paragraph 1 (*b*).

351. It is unnecessary to set out the whole of the text of article 24 as it would be if these suggestions were adopted but it may be worth indicating that paragraph 1 (*b*) might read as follows:

...

(*b*) either **the newly independent State or the party provisionally applying the treaty** * gives reasonable notice of such termination and the notice expires; or...

352. Apart from possible minor changes of drafting such as those indicated above, article 24 appears to be generally acceptable and accordingly the Special Rapporteur proposes that it be adopted.

SECTION 5. STATES FORMED FROM TWO OR MORE TERRITORIES

Article 25. Newly independent States formed from two or more territories

Comments of Governments

Oral comments

353. *Spain.* In addition to commenting on the involved wording of sub-paragraphs (*a*) and (*c*) of article 25, the Spanish delegation said that the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty was satisfactorily provided for in articles 25, sub-paragraph (*a*); 26, paragraph 1 (*b*); 27, paragraph 2 (*b*); and article 28, paragraph 1 (*b*), which dealt respectively with newly independent States formed from two or more territories, the uniting of States, the dissolution of a State and the separation of part of a State.[267]

El Salvador. The delegation of El Salvador said that the Commission had succeeded in dealing with an extremely complex and difficult subject in an amazingly small number of articles, which not only covered the existing situation with regard to succession of States in respect of treaties but also looked to the future. Article 25, for instance, specified that, with certain exceptions, any treaty which was continued in force under articles 12 to 21 would be considered as applying in respect of the entire territory of a newly independent State formed from two or more territories.[268]

Written comments

354. *Netherlands.*[269] The Netherlands Government commented as follows:

In cases of union of two or more dependent territories into one newly independent State, articles 12 to 21 are applicable. Treaties which are continued as a result of this application are, under article 25, considered as being in force for the *entire* territory of the new State. This means that the other States parties to treaties that were applicable in only one part of the new State prior to independence will be confronted with a much larger area of application than the area in respect of which they originally agreed to apply those treaties. They may well see objection to this in respect of certain treaties. This illustrates the point made by the Netherlands Government ... above;[270] the principle of equality of all parties to a treaty demands that in all cases of State succession mentioned in parts II, III and IV of the draft the other States parties have the right to *object* to continuation of their treaties vis-à-vis a successor State. The Netherlands Government would call attention to the possibility of *conflicting treaties* that were in force in the separate parts of the component State before the merger into one State. Such

* Words in **bold type** are replacements for or additions to the original draft.

[264] See para. 335 above, under article 22.

[265] *Ibid.*

[266] See above, para. 336 under article 22, paras. 338-339 under article 22, para. 1, and para. 341 under article 22, para. 2.

[267] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 26.

[268] *Ibid.*, 1323rd meeting, para. 11.

[269] As the comments of the Netherlands Government were received too late to be incorporated in the earlier part of the present report, they are quoted only under articles 25 *et seq.* For the full text of the comments, see p. 318 below, document A/9610/Rev.1, annex I.

[270] In paras. 7 and 8 of the Government's comments, which read as follows:

7. The continued validity of the treaties of the predecessor State for the remainder of its territory, as well as the continued applicability of its treaties in respect of successor States laid down in *articles 25 to 28*, are subject to an exception resulting from another important rule of treaty law, codified in article 62 of the Vienna Convention: the possibility of invoking a *fundamental change of circumstances* as a ground for termination of or withdrawal from a treaty. The Netherlands Government would assume that the fact of a State succession may well be *in itself* a fundamental (radical) change of circumstances, which may be invoked by *all* States concerned (predecessor State, successor State, other States parties), as an exception to continued applicability of a treaty. In this respect the draft might be more clear. The possibility of invoking a fundamental change of circumstances is mentioned only in articles 25 to 28, but should be clearly set out before the parts II, III and IV as a second " umbrella-article ", covering, for instance, the case of article 10.

8. The principle of equality of all parties to a treaty is acknowledged by the Commission in *article 4*; *article 12*, paragraph 3; *article 13*, paragraph 3; *article 19*, and *articles 22 to 24*. Here it is not only the newly independent State which has the right to apply for admittance as a party, but the " other States parties " (of article 2, paragraph 1 (*m*)) rightly have a " say " in the matter of the continued applicability of their treaties in respect of a successor State. The Netherlands Government would suggest that this important principle be also acknowledged in other cases of State succession to multilateral treaties; in such a way that each "other State party" would have a right to *refuse* establishing relations under the treaty in respect of a certain successor State, *unless* this refusal would be incompatible with the object and purpose of the treaty, as would, for instance, be the case if the treaty allowed for participation by " all States ".

treaties cannot be applied at the same time in the entire territory of the new State. In such cases the component State will have to choose between issuing a declaration of succession to only one of the treaties, or letting both of them lapse.

United Kingdom. The United Kingdom Government commented as follows:

The rule in sub-paragraph (*a*) has two alternative tests—compatibility and "radical change of conditions". Only the former is proposed in article 10, sub-paragraph (*b*). The compatibility test is not always easy to apply, in practice, regarding reservations. The test of a radical change of conditions, which sounds similar to that of fundamental change of circumstances, is new and may also give rise to different interpretations in practice. The right proposed in sub-paragraph (*b*) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention.

United States. The United States Government said that article 25 provided that, when a newly independent State was formed from two or more territories which had differing treaty régimes prior to independence, any multilateral treaty continued in force pursuant to the prior articles relating to newly independent States was applicable either to the entire territory of the new State or only to the former territory to which it applied at the option of the new State. The Government questioned whether this was a reasonable rule, taking, for example, the possibility that the rule could result in the application of the Vienna Convention on Consular Relations to a consular district in one section of a State while a consular district in another section could be subjected to a different set of requirements. Another example given was that the immunities of a diplomatic agent might vary according to whether he was in the part of the State covered by the Vienna Convention on Diplomatic Relations or not. The Government suggested that sub-paragraph (*b*) of the article should be deleted. The newly independent State was not required to maintain the treaty in effect and sub-paragraph (*a*) afforded sufficient protection to take care of the unusual case. The only difficult point not covered by sub-paragraph (*a*) was the situation when multilateral treaty obligations applicable in one section would conflict with treaty obligations applicable in another section. In such cases, the newly independent State, if it wished to maintain both treaties in effect, should be entitled to limit application to the original territory.

Observations and proposals of the Special Rapporteur

355. There has been no challenge to the principle of article 25, which provides a presumption, in the case of a newly independent State formed from two or more territories, that a treaty continued in force by a notification of succession is considered as applying in respect of the entire territory of that State. The Netherlands Government, however, has pointed out that the possible expansion of the area of application of a treaty that may result from that provision emphasizes the inequality created by the draft articles as between a newly independent State and other States parties to a multilateral treaty. The Netherlands Government, relying on the principle of the equality of all parties to a treaty, seeks provision, not only in the case of article 25, but also in all other cases of State succession mentioned in parts II, III and IV of the draft articles, that the other States parties shall have the right to object to continuation of their treaties vis-à-vis a successor State.

356. The problem of "inequality" has been considered elsewhere in the present report, especially in connexion with article 12.[271] It would be possible to avoid such inequality by giving another State party to the multilateral treaty the right to prevent entry into force of the treaty between itself and the newly independent State by making an objection to the notification of succession. The Special Rapporteur, however, concluded that the introduction of a system of objections for the purposes of the second and third paragraphs of articles 12 and 13 "would be contrary to the general intent of the articles in part III of the draft".[272] But that conclusion is not necessarily decisive with respect to article 25. Indeed, it may be said that the extension of a treaty to additional territory by the unilateral act of the newly independent State without the agreement (express or implied) of the other State party is contrary to the basic principle of consent. On the other hand, such relevant practice as there is seems to support the presumption for which article 25 provides and the principle embodied in the article has attracted some support and no criticism other than that implicit in the Netherlands Government's comments.[273] In these circumstances, it appears to be advisable to retain the main provision in article 25 as it stands, even though there are considerations in favour of giving another State party to a multilateral treaty the right to refuse to accept the extension of the application of the treaty beyond the territory to which it applied before the succession of States.

Sub-paragraph (a)

357. There are, in effect, three different comments on sub-paragraph (*a*). First, the Spanish delegation would add to several articles the exclusion of cases where the succession would radically "change the conditions for the operation of the treaty". The Netherlands Government has suggested the inclusion in part I of an "umbrella" article providing for the possibility of invoking a fundamental change of circumstances, not only with respect to articles 25 to 28, but also with respect to the other cases covered by parts II, III and IV. The United Kingdom Government, on the other hand, has criticized the last condition in sub-paragraph (*a*) on the grounds that, while similar to the condition of "fundamental change of circumstances", it is new and that it may give rise to different interpretations in practice.

358. The Special Rapporteur, without following the views of the Spanish delegation in the case of all the articles mentioned by it, has already given support to the addition in article 10, sub-paragraph (*b*), of the provision concerning radical change in the conditions for the operation of the treaty.[274] The underlying reason is, of course,

[271] See paras. 221-253 above.

[272] See para. 252 above.

[273] The mention of conflicting treaties by the Netherlands Government is taken to be intended, not as a criticism of the draft, but to call attention to a problem that may face a newly independent State formed from two or more territories.

[274] See paras. 207-209 above.

that a transfer of territory may have effects similar to those of the creation of a newly independent State from two or more territories. In cases falling under article 25, the territorial changes, while not necessarily having consequences that would justify the invocation of a fundamental change of circumstances under article 62 of the Vienna Convention on the Law of Treaties, might so alter the conditions for the operation of the treaty that it would be grossly unfair to enable the newly independent State to insist on the extension of the treaty to the whole of its territory. Indeed, the inclusion of this provision goes some way towards meeting the comments of the Netherlands Government considered above.[275]

359. If the last part of sub-paragraph (*a*) were no more than a re-statement of the provisions of article 62 of the Vienna Convention, the words used would surely be inadequate. It is because the words are different in effect that they are useful and necessary. As indicated elsewhere in the present report, the Special Rapporteur would not favour piecemeal repetition of the provisions of the Vienna Convention in the draft articles, unless there are sound reasons for doing so in the case of a particular provision. In general, unless the situation contemplated requires some special provision in the context of the draft articles, no attempt should be made to incorporate some articles, but not others, of the Vienna Convention. Subject to the provisions required by the succession of States, the general law of treaties should apply.

360. Having regard to the above considerations, the Special Rapporteur would not advise the deletion of the words "or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty", or the addition of a provision on fundamental change of circumstances as an "umbrella" article in part I of the draft.

Sub-paragraph (b)

361. The United Kingdom Government commented that the right proposed in sub-paragraph (*b*) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention. This may be so, but the point is not absolutely clear. Although as a rule, according to article 29 of the Vienna Convention, a treaty is binding upon each party in respect of its entire territory, a different intention may be "otherwise established". It is not contrary to the spirit of that provision to allow a newly independent State, in the circumstances in which article 25 applies, to establish a different intention in its notification of succession. In any event, this is just the kind of "question" which could properly be regarded as not "prejudged" by the provisions of the Vienna Convention (see article 73 thereof).

362. Finally, there is the suggestion of the United States Government that sub-paragraph (*b*) should be deleted or rather that it should be limited to the situation where multilateral treaty obligations applicable in one section of the newly independent State would conflict with treaty obligations applicable in another section. This is a refinement that might be adopted, but there do not seem to be any compelling reasons for its adoption. Cases, such as the examples given in the comments of the United States Government, could arise, but they would occur as a result of the manner in which the choice conferred by article 25 was exercised by the newly independent State, rather than as a result of the right to choose as such. On balance, it might be wiser to run the risk of errors being made by the newly independent State rather than to run the risk of creating difficulties in unforeseen cases by limiting the scope of sub-paragraph (*b*).

363. For the reasons indicated above the Special Rapporteur makes no proposals for the amendment of article 25.

[275] See paras. 355-356 above.

PART IV

UNITING, DISSOLUTION AND SEPARATION OF STATES

Article 26. Uniting of States

Comments of Governments

Oral comments

364. *Netherlands.* The Netherlands delegation, when commenting on law-making treaties and the position of newly independent States, said that they must of course be able to withdraw from such conventions but there was no need to presume that they would wish to do so. The delegation then, remarking that, in its draft, the Commission had taken a more positive approach in favour of the effectiveness of multilateral treaties, drew attention to the commentary[276] to article 26.[277]

Australia. Having discussed the draft articles relating to newly independent States, the Australian delegation said that a somewhat different problem arose when a new State was formed by the uniting of two or more States. The delegation agreed with the Commission that in such a situation any treaty in force between any of those States and other States should continue in force. The delegation, however, reserved its position with respect to article 26, paragraph 2. Although that paragraph was a strict application of the principle of consent, the delegation wondered whether there might not be a strong case for relaxing that principle in such a situation so as to make the treaty applicable to the successor State as a whole.[278]

Poland. The Polish delegation drew attention to the commentaries on the uniting, dissolution and separation of States contained in part IV of the draft articles and said that those were problems of the future with which modern international law would have to deal.[279]

Denmark. The Danish delegation said that the Commission had adopted important provisions with regard

[276] Para. 30 of the commentary.

[277] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1317th meeting, para. 19.

[278] *Ibid.*, 1319th meeting, para. 6.

[279] *Ibid.*, 1320th meeting, para. 18.

to the uniting, dissolution and separation of States. Those were the forms of succession which were likely to occur in the future, and the Commission had been well advised to seek legal regulation of them.[280]

Spain. The Spanish delegation commented on the involved wording of paragraph 2 (*c*) of article 26.[281]

India. The delegation of India said that the Commission had shown commendable foresight in drafting provisions concerning State succession to cover cases of uniting, dissolution or separation of States. It was in that area that future problems of succession were likely to arise.[282]

Ghana. The delegation of Ghana agreed completely with the Netherlands delegation regarding the problems that would arise more and more frequently in the future in cases of unification, dissolution or separation of States. In the opinion of the delegation, political unity or integration could be said to have occurred only when States which had previously been independent and sovereign were placed, in whole or in part, under one common political authority.[283]

Egypt. The Egyptian delegation considered that there was a certain disproportion between the part of the draft articles which dealt with newly independent States and the other part dealing with the uniting, dissolution and separation of States, particularly as the most common form of succession in the future would arise from such situations. Article 26, sub-paragraph 1 (*b*) and article 27, paragraph 2 were too general in scope and thus lent themselves to different interpretations. The whole purpose of codification was the establishment of rules which would create conditions of stability. The Egyptian delegation did not believe that such would be the result if those articles were maintained in their present form.[284]

El Salvador. The delegation of El Salvador remarked that part IV of the draft established that treaties would generally continue in force in cases of uniting, dissolution and separation of States.[285]

Kuwait. The Kuwaiti delegation felt that more thorough consideration should be devoted to the question of the union, amalgamation and dissolution of States, such situations being frequent in the contemporary world.[286]

New Zealand. The New Zealand delegation said that, when dealing with rules which related primarily not to an era of decolonization now largely past but to the union of States and their dissolution, the Commission placed far more emphasis on the continuity of treaty relations. In his delegation's view, that approach was justified both by the important precedents of the United Republic of Tanzania and the United Arab Republic and also by the need to ensure stability in the event of amalgamations which could well prove to be the most common case of State succession in the future.[287]

Canada. The Canadian delegation said that articles 26 to 28 raised complex questions on which most Governments would wish to reflect at leisure.[288]

Belgium. The Belgian delegation said that the Commission had felt able to link the clean slate principle to the principle of self-determination. It might have been more logical to base the clean slate principle on State sovereignty, which implied that a State could not be bound by a treaty without its consent. In that context, the clean slate principle would automatically be established because it was an essential attribute of the autonomy of the new State with respect both to internal matters and to international relations. In that connexion, it might perhaps be said that the Commission had let itself be impressed unduly by the phenomenon of decolonization, which had led it to draw an artificial distinction between "newly independent States" and States resulting from the separation of part of an existing State, the uniting of two or more States or the dissolution of a State. The Belgian delegation felt that one category would have sufficed, that of the "new State", which would have made it possible to save words and entire articles.[289]

United Republic of Tanzania. The Tanzanian delegation said that in view of the almost completed process of decolonization one wondered whether there would ever arise a situation where the articles in part III of the draft would be invoked in practice. It would be well, therefore, to concentrate on cases of uniting, dissolution and separation of States, as several other delegations had suggested.[290]

Written comments

365. *Netherlands.* The Netherlands Government said that, in part III of the draft, the rights of a successor State to complete the signature of its predecessor (by ratification, reservations, choice of different provisions) were carefully worked out. Such provisions would be equally useful in the cases of States succession mentioned in articles 26 and 27.

Poland. The Government of the Polish People's Republic said that for the question of inheritance of treaties, the only just approach had been adopted by the Commission—namely, the principle of "continuity" in the cases of the different types of succession, such as "uniting", or "dissolution" of States.

Sweden. The Swedish Government said that it was not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State (articles 26 and 27).

[280] *Ibid.*, 1321st meeting, para. 35.

[281] *Ibid.*, 1320th meeting, para. 25. See also para. 353 above under article 25.

[282] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1321st meeting, para. 46.

[283] *Ibid.*, 1322nd meeting, para. 36.

[284] *Ibid.*, 1323rd meeting, para. 4. In fact according to this paragraph, the representative of Egypt referred to article 25, paragraph (*b*) and article 27. As to the former article, however, it seems to the Special Rapporteur that his comments have greater relevance to article 26, para. 1 (*b*).

[285] *Ibid.*, para. 11.

[286] *Ibid.*, para. 16.

[287] *Ibid.*, para. 31.

[288] *Ibid.*, 1324th meeting, para. 16.

[289] *Ibid.*, para. 23.

[290] *Ibid.*, 1325th meeting, para. 29.

United Kingdom. The United Kingdom Government said that the two tests in paragraph 1 (*b*) were similar to those proposed in sub-paragraph (*a*) of article 25, but they were applied to different questions—in article 26 to that of the continuance in force of a treaty and in article 25 to that of the extent of a treaty's application. In article 26, the latter question was dealt with by an entirely different approach in paragraph 2. The justification for those differences was not clear.

Observations and proposals of the Special Rapporteur

366. The Commission considered the meaning to be attributed to a "uniting of States" and the underlying principle to be applied to a succession of States in such circumstances at its 1177th to 1179th meetings.[291] A large majority of the Commission favoured the principle of *ipso jure* continuity over that of consent in this instance. While it was recognized that there was little support in State practice for this principle, and that its adoption would involve an element of progressive development, it was accepted for the purposes of draft article 26.

367. The adoption of the principle was thoroughly considered by the Commission and the wisdom of its choice has been underlined by the general support given in the comments of delegations and Governments. Only the comments of the Belgian delegation in the Sixth Committee preferred the clean slate principle to the principle of continuity in the case of the uniting of States.

368. In these circumstances, one might be tempted to suggest that article 26 should be adopted by the Commission without much discussion. The Commission might be encouraged in following that course by the absence of many comments on the details and the implications of the article. It may be observed, however, that, while the meaning of "a union of States" and the basic principle were thoroughly considered by the Commission, it is not so apparent that detailed consideration was given to all the implications of the adoption of the principle. Some further consideration and clarification may be necessary not only by virtue of the comments of Governments but also because of the place that article 26 finds in the draft as a whole and the need to ensure that its application will, in practice, be as satisfactory as possible. In this connexion, it may be helpful to make some observations on the cases to which the article would apply as well as on the provisions of the article itself.

(a) *Uniting of States*

369. When the Special Rapporteur, Sir Humphrey Waldock, submitted his alternative texts entitled "Article 19. Formation of unions of States", he also put forward a definition of "union of States".[292] This was an expression which had commonly been used by writers on international law and it was natural that initially it should be used by the Special Rapporteur. In the event, however, the Commission did not adopt the definition suggested or indeed any definition of "union of States". In fact, the Commission re-drafted the title to read: "Article 26. Uniting of States". In effect, it defined what was meant by "uniting of States" by saying at the beginning of paragraph 1 "on the uniting of two or more States in one State".

370. On the face of it, these words cover any case where two or more States are united in a single State whatever may be the constitutional structure of the State after that event. This interpretation is confirmed by the commentary. The paragraph which is most particularly relevant concludes by saying, "In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in the article".[293]

371. Having regard to the all-embracing character of the meaning attributed to a "uniting of States", it may be necessary to consider the relation between a "transfer of territory" under article 10 and a "uniting of States" under article 26. If article 10 is limited to a transfer of territory from one State to another, no problem arises and the two articles would seem to be complementary to one another. If, on the other hand, article 10 is intended to apply also to the case in which the territory of a State is wholly absorbed by that of another State, there would appear to be an overlap and possibly conflict between the provisions of the two articles. If one State absorbs the entire territory of another State, it is at first sight difficult to see how that differs from a case in which two or more States unite, which falls within article 26. In any event, having regard to the provisions of articles 6 and 31, which would exclude from the scope of the draft articles a case in which one State absorbs another as a result of the use of force, it is difficult to see what scope there could be for the application of article 10 in a case in which the entire territory of a State is absorbed into the territory of another State. If it is thought that a distinction should be drawn on the basis of the internal constitutional structure after the absorption or the uniting of States, this would seem to run contrary to the concept of a "uniting of States" adopted for the purposes of article 26.

372. It seems to the Special Rapporteur that there is a question here which requires further thought and on which it might be advisable to make some clarification, if not by an adjustment of the text of article 10 or article 26, at least by some explanation in the commentary.

(b) *The provisions of the article*

373. A number of delegations commented on the complexity of the questions involved in article 26 and the need for more thorough consideration of the articles in part IV. A contrast was drawn between the detailed provisions relating to newly independent States in part III and the comparatively short provisions in articles 26, 27 and 28.

374. As a general observation, it may be said that the complexity of the provisions in part III arises from the nature of the solution offered and, in particular, the

[291] *Yearbook ... 1972*, vol. I, pp. 158 *et seq.*, 1177th meeting, paras. 62-82, 1178th meeting, and 1179th meeting, paras. 1-64 (Consideration of article 19 of the draft articles proposed by Sir Humphrey Waldock.)

[292] See *Yearbook ... 1972*, vol. II, p. 18, document A/CN.4/256 and Add.1-4, article 19 and proposed sub-paragraph (*h*) for article 1.

[293] Para. 2 of the commentary to article 26.

option given to a newly independent State to continue multilateral treaties by making a notification of succession. Where, as in the case of article 26, there is a provision for *ipso jure* continuity, it may be thought that there is no need to make such detailed provisions, e.g. provisions corresponding to article 17 (notification of succession) and article 18 (effects of a notification of succession). The fact that the provisions of part III are more detailed is not in itself a reason for seeking to make those of part IV more complicated. Nevertheless, it may be desirable to consider in the light of the provisions of part III whether adequate attention has been paid to the provisions of part IV. In the light of the comments of Governments, however, it is not thought that the Commission ought to search too far. For example, while the Canadian delegation said that articles 26 to 28 raised complex questions on which most Governments would wish to reflect at leisure, the Canadian Government has not in the event submitted any comments on those articles. It may be a fair inference that on reflection most Governments have come to the conclusion that although the articles are short they do not need much by way of supplementary provisions.

375. Bearing in mind these general observations, it may now be convenient to consider each of the paragraphs of article 26 in turn and then the suggestion of the Netherlands Government for additional provisions.

Paragraph 1

376. The Egyptian delegation considered that paragraph 1 (*b*) was too general in scope and lent itself to different interpretations. According to that delegation, the purpose of condification was the establishment of relations which would create conditions of stability and it did not believe that stability would result from the provisions in their present form. The comments of the United Kingdom Government, although couched in the form of a request for justification of differences in certain of the provisions of articles 25 and 26, having regard to that Government's comments on article 25, should probably be read as a criticism somewhat similar in effect to that of the Egyptian delegation. The question that is raised is whether it is satisfactory to take as a test for the exclusion of a treaty from continuity under paragraph 1 of article 26 incompatibility or a radical change in the conditions for the operation of the treaty. Since there can surely be no objection of principle to the incompatibility test, this really amounts to a question whether the test of radical change in conditions is either too wide or too vague to be applied.

377. It may be observed that many provisions of the draft articles may be difficult to apply unless there is good will on the part of all the States concerned. But this has not deterred the Commission from adopting provisions which it has considered to be right in principle. Moreover, on the whole this approach to the drafting of the articles has not attracted serious criticism from Governments. Of course, where certainty is possible, this is desirable. But a provision which is sound in principle should not, in the opinion of the Special Rapporteur, be rejected merely because it may give rise to difficulty in application. There may be room for further discussion in connexion with the final words of paragraph 1 (*b*), but the Special Rapporteur would align himself with those who have supported the inclusion of the words "or the effect of the uniting of States is radically to change the conditions for the operation of the treaty". Of course, if the words can be made more precise, this should be done, but the Special Rapporteur does not propose their deletion.

378. On the other hand, it may be desirable in the commentary to explain more fully why these words have been used and what it is anticipated their effect will be. It might also be desirable to provide some explanation, in answer to the questions raised by the United Kingdom Government.

Paragraph 2

379. The Australian delegation reserved its position with respect to paragraph 2. While recognizing that the paragraph was a strict application of the principle of consent, the delegation wondered whether there might not be a strong case for relaxing that principle in such a situation so as to make the treaty applicable to the successor State as a whole. The comment of the Australian delegation is the only one to have been made in the sense indicated. In the absence of any obvious reasons, it is difficult to see what "strong case" there is for abandoning the principle of consent and modifying the provisions of paragraph 2. The point, of course, should be considered by the Commission, but the Special Rapporteur has no proposal to make in this connexion.

Paragraph 3

380. The Special Rapporteur has not found any comments of Governments on paragraph 3, but would observe that the effect of the paragraph as drafted does not clearly correspond with the intention expressed in the commentary. The intention seems to be to deal with the case where "a further State unites with States already united as one State".[294] No doubt what is in mind is the case in which one succession of States is rapidly followed by another where the succession occurs because of the uniting of States. Effect does not seem to be given to this intention by the use of the expression "a successor State".

381. Moreover, it is open to question whether the paragraph is necessary because, when a succession has taken place by the uniting of two or more States in one State, the latter is by hypothesis established as a State and, in the next process of uniting, will be not "a successor State" but "a predecessor State". The Special Rapporteur does not make any specific proposal in this connexion but suggests that the Commission should reconsider both the necessity for the paragraph and its drafting.

(c) *Completion of signature*

382. The Netherlands Government has called attention to the fact that in part III of the draft the rights of a successor State to complete the signature of its predecessor (by ratification, reservations, choice of different provisions) were carefully worked out and has suggested that such provisions would be equally useful in the cases

[294] Para. 31 of the commentary.

of State succession mentioned in articles 26 and 27. The Government's comments refer to both articles 26 and 27 but, as the circumstances are different, the comments will be considered under each article separately.

383. The articles to which the Netherlands Government has referred appear to be article 13 (Participation in treaties not yet in force), article 14 (Ratification, acceptance or approval of a treaty signed by the predecessor State), article 15 (Reservations) and article 16 (Consent to be bound by part of a treaty and choice between differing provisions). Each of those articles involves different considerations and it is still open to question whether the Commission will retain article 14.

384. It may be noted that, as they stand, articles 26 and 27 proceed from the same basis as article 12, i.e. they concern treaties in force at the date of the succession of States. This is not the case with respect to all the provisions of articles 13, 14, 15 and 16. For the purpose of considering this comment of the Netherlands Government, it is necessary to examine each of those articles in turn.

385. By hypothesis, article 13 is dealing with a multilateral treaty which has not entered into force at the date of the succession of States if before that date the predecessor State had become a contracting State. Subject to the provisions of article 13, it enables a newly independent State by a notification of succession to establish its status as a contracting State to the treaty. The effect of article 26, as it stands, would appear to be to deprive a State formed by the uniting of States of the benefit of the status of one of the predecessor States as a contracting State in cases in which the treaty was not in force before the date of the succession. As a matter of logic, it is a little difficult to see why a newly independent State should be able to take advantage of such a situation, but that the uniting of States where there is *ipso jure* continuity of treaties should have the effect of destroying the effects of a consent to be bound given by one or more of the States which are uniting. There may be good reasons for the distinction, but they are not obvious. There is, of course, a distinction in that the newly independent State, when making a notification of succession, is in fact expressing its own consent to be bound, whereas a State formed by the uniting of States will be bound *ipso jure*. Nevertheless, if the consideration of encouraging participation in multilateral treaties is borne in mind, it may be that provision should be made for the new State in such cases to be considered as bound by the consent given by one or more of the predecessor States.

386. In the view of the Special Rapporteur, however, the reasons for making such a provision are not so clear and strong as to justify the submission of a proposal to the Commission as regards article 26, but he suggests that consideration should be given to the point by the Commission.

387. So far as the provisions of article 14 are concerned, they relate to a case in which the predecessor State has not given its consent to be bound but the newly independent State nevertheless is given the right to take advantage of the signature by ratification, acceptance or approval of the treaty. Although one can imagine *ipso jure* continuity in a case in which a State has given its consent to be bound, it is difficult to think that this would be reasonable in a case where a State is not bound but has merely signed the treaty. Of course, a discussion of article 14 itself may throw further light on this question, but meanwhile the Special Rapporteur would not advise making the benefits of article 14 available in the case of a uniting of States.

388. As regards article 15 on reservations, the *ipso jure* continuity for which article 26 provides would leave no occasion on which it would be appropriate for reservations to be made. Article 15 is directly related to the provision for a notification of succession which is treated as corresponding to one of the occasions on which a State may formulate a reservation under article 19 of the Vienna Convention. There does not appear to be any reason why a State formed by the uniting of two or more independent States should thereupon acquire the right to alter existing reservations or to make new ones. The underlying principle is that, in cases falling under article 26, the successor State takes the treaties of the predecessor State as they stand at the date of the succession of States. Accordingly, the Special Rapporteur proposes that the Commision should not adopt the suggestion of the Netherlands Government so far as it relates to reservations.

389. For similar reasons, the Special Rapporteur does not advise the Commission to adapt the provisions of article 16 for the purposes of article 26.

Article 27. Dissolution of a State

Comments of Governments

Oral comments

390. *Finland.* The Finnish delegation said that article 27, concerning dissolution of a State, favoured the principle of continuity. While the application of that principle seemed perfectly legitimate in the case of a dissolution of a union of States, the members of which frequently had some degree of international personality, the delegation doubted whether it was acceptable in the case of a union State [unitary State?], where the clean slate principle should be applied.[295]

Spain.[296]

Belgium. The Belgian delegation commented that article 15 should, like the preceding articles, have been based on the clean slate principle and should have provided that the new State would have to renew the reservation made by the predecessor State if it intended to maintain it with respect to itself. The same observation was applicable to article 27: it might be asked if the clean slate principle should not have led to a conclusion directly opposite to that which the Commission had reached.[297]

[295] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 3.

[296] See para. 353 above, under article 25.

[297] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, para. 24. See also para. 364 above, under article 26.

Zambia. With regard to articles 27 and 28, the Zambian delegation found it difficult to appreciate the necessity for distinguishing between the dissolution of a State and the separation of a State and for providing that, in the first place, treaty relations should continue whereas, in the second case, the clean slate principle would be applicable. It would be advisable, if only for reasons of consistency, that the same provision should be applied to both situations, unless it was made clear that the dissolution related to a union of former independent States.[298]

Written comments

391. *Czechoslovakia.* The Czechoslovak Government said that article 27 dealt with succession in respect of treaties of States that were newly established following disintegration of a former State formation. In its opinion, the clean slate principle should be set in such cases as a rule. The present formulation, which referred to this principle in paragraph 2 as an exception only, was insufficient. (Czechoslovakia, which had come into existence in 1918 as an independent State upon the disintegration of Austria-Hungary, had proceeded from the clean slate principle in its practice.)

German Democratic Republic. The Government of the German Democratic Republic said that for several reasons it was not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in article 27. Unlike uniting (article 26), the dissolution of a State as a rule took place without a treaty, which meant against the will of the existing State. In terms of social conditions, any such States were new States whose position after succession must, as a matter of principle, not be inferior to that of "newly independent States". It was, therefore, hard to understand why article 27 contained the same provisions as article 26. The Government continued by commenting that, although article 27, paragraph 2, provided for exceptions from *ipso jure* continuity, thus allowing a limited option for the successor State, that was certainly not satisfactory. A dissolutions of States could, in essence, be compared with decolonization rather than with the uniting of States, it was the opinion of the Government that the principle of clean slate should be established here as a rule and not as an exception. Besides, the Government wished to underline its position that the interest in having largely preserved the existing state of international treaty relations in so far as these have come about in conformity with the established principles of international law, should receive more attention in the draft.

Netherlands. The Netherlands Government commented as follows:

Articles 27 and 28. These articles are of special interest to the Kingdom of the Netherlands. The Kingdom consists of three component countries: the Netherlands, the Netherlands Antilles and Surinam. If the Netherlands Antilles and Surinam in the near future become independent States, from a purely legal point of view article 27 of the present draft would be applicable, in view of the constitutional rules embodied in the *Statuut voor het Koninkrijk*. From a historical point of view, however, it might be more appropriate to apply article 28, paragraph 2, to the Antilles and Surinam and article 28, paragraph 1, to the Netherlands. Generally speaking, in most cases of dismemberment the personality of the original State is, from a historical point of view, continued by one of the component parts. Several treaties of the Kingdom have been concluded or denounced in respect of only one or two of the component parts; this is mentioned in the instrument of ratification or denunciation. If article 28 should be applied, it is not clear whether this case is covered by the words in paragraph 1(*b*) "[unless] it appears from the treaty or from its object and purpose . . .". In that respect, the phrasing of article 29 of the Vienna Convention: "Unless a different intention appears from the treaty *or is otherwise established** . . ." would seem better to serve the purpose.[299]

United States of America. The United States Government said that the distinction between the dissolution of a State (article 27) and the separation of part of a State (article 28) was quite nebulous. The principal criterion appeared to be that, in dissolution the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State. This differentiation seemed largely nominal. If State A split in half and the half called itself State B and the other State C, should this produce different results than if State A split in half and the half called itself State B and the other half State A, or *vice versa*? The practice cited in the commentaries to the two articles did not provide substantial assistance in sharpening the distinction between the two situations. The Government suggested that article 28 added an unnecessary element of complexity to the draft articles and that the concept of "newly independent State" was sufficiently broad to encompass the separation of part of a State in all those cases in which application of the rules in part III was indicated.

Observations and proposals of the Special Rapporteur

392. There are two basic questions that arise out of the comments of Governments on article 27. First, is there sufficient distinction between the "dissolution of a State" (article 27) and "the separation of part of a State" (article 28) to justify treating the former as a category of its own? Secondly, if the "dissolution of a State" is to be treated as a distinct category should the article be based on the principle of *ipso jure* continuity, the principle of consent or the clean slate principle? If there is no real distinction between the two categories, it is unnecessary to have two articles to deal with them. On the other hand, even if there is a real distinction, it does not follow automatically that there must be a different solution for each of them.

(a) *Distinction between "dissolution" and "separation of a part"*

393. It is clear from the discussion in the Commission [300] of what was then article 20 (dissolution of a union of States) was coloured by the traditional meaning of a "union of States" and the implication that the component parts of the union retained a measure of individual

[298] *Ibid.*, 1326th meeting, para. 10.

* Italics supplied by Netherlands Government.

[299] See also para. 365 above, under article 26.

[300] *Yearbook . . . 1972*, vol. I, pp. 183, *et seq.*, 1180th meeting, paras. 15-72 and 1181st meeting, paras. 1-43.

identity during the existence of the union. This concept may have affected, perhaps imperceptibly, the view of members of the Commission on the distinction between dissolution and separation of part of a State. The Commission, however, did not retain the concept of a "union of States" for either article 19 or 20 (now articles 26 and 27). On the contrary, for article 27, as well as for article 26, the concept of "the State" was taken as the starting-point for the draft article. The implication is that for the purposes of article 27, as well as for those of article 26, the internal structure of the State is regarded as immaterial: this point is made very clear in the commentary to article 27.[801] From the view-point of modern international law, this seems to be a sound approach, but it does give rise to the question whether, in that event, there is any real difference between a State that dissolves into parts and one from which a part separates. It may be said that in both cases the State divides into parts.

394. This kind of thinking is reflected in the comments of the Finnish delegation and the United States Government. The United States Government said that the distinction between the two categories was quite nebulous. The Government identified the principal criterion as being that in dissolution the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State, and described the differentiation as "largely nominal".

395. In the view of the Special Rapporteur, there is a clear theoretical distinction between dissolution and separation of part of a State. Indeed, the United States Government has itself identified the distinction. In the former case, the predecessor State disappears; in the latter case, the predecessor State continues to exist after the separation. This theoretical distinction may well have implications in the field of succession in respect of treaties. Let us take an example, which is not difficult to imagine: State A consists of four parts, each of which is in some measure territorially distinct and in each of which there is a different ethnic and cultural background. If one part separates from State A, the international personality of State A will continue. If, on the other hand, the State dissolves and each of the four parts becomes independent, the international personality of State A will disappear. It is, of course, possible in this event that one of the four parts may continue to be regarded as State A and to continue to enjoy its international personality. Then, what would otherwise be a case of dissolution will be regarded as a case of separation of parts of a State.

396. The fact that, in particular cases, it may be difficult to determine whether there has been a dissolution or a separation does not affect the theoretical distinction; nor, in the view of the Special Rapporteur, does it alter the importance of maintaining that distinction so that it may be applied where appropriate.

(b) *Consequences of the distinction between dissolution and separation of part of a State*

397. If it is accepted that there is at least a theoretical distinction between dissolution and separation of part of a State, it does not necessarily follow that the effects of the succession of States in the two categories of cases must be different for the parts which become new States. In other words, it would be possible to treat the new States resulting from the dissolution of an old State as if they were parts that were separating, leaving the old State in existence. It would, however, in any event be necessary to provide for the continuation in force of treaties with respect to the old State in cases in which it continues to exist after the separation.

398. A number of the comments of Governments have raised the question whether, in the case of a dissolution of a State, the principle of continuity or the clean slate principle should be applied. The tendency of many of the comments is in favour of the application of the latter principle: these include the comments of the Finnish, Belgian and Zambian delegations, and of the Governments of Czechoslovakia, the German Democratic Republic, the Netherlands and the United States of America. It is in reality with respect to the consequences that some of these comments question the validity of the distinction between a dissolution of a State and a separation of part of a State. They suggest that there is no sound basis for applying the principle of continuity to new States created upon a dissolution, while applying the clean slate principle to States emerging by separation from an existing State.

399. Unfortunately, the precedents are few and the arguments based on principles of international law, including those relating to treaties, are far from conclusive. In both categories of cases, one may argue from the principle of self-determination as applied to a new State and from the need to maintain the stability and continuity of treaty relations.

400. In the comments of Governments, the case for assimilating the provisions of article 27 to those of article 28 is argued most strongly by the Government of the German Democratic Republic, which said that it was not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in article 27. The Government pointed out that a dissolution of a State as a rule took place without a treaty, against the will of an existing State and that, in terms of social conditions, the States so created were new States whose position "must as a matter of principle not be inferior to that of 'newly independent States' ". The Government did not consider the exceptions for which provision was made in paragraph 2 sufficient for the successor State. By contrast with the uniting of States, the Government said that dissolution was to be compared with decolonization, and concluded that the clean slate principle should be established as the rule and not as an exception in cases of dissolution. It may, however, be pointed out that the comments of the Government of the German Democratic Republic continued by stressing its interest in preserving the existing state of international treaty relations and saying that this should receive more attention in the draft. This, on the face of it, appears to be an argument in favour of maintaining the principle embodied in article 27.

[801] Para. 12 of the commentary.

401. As against the arguments of the German Democratic Republic, it may be observed that there is a basic distinction of substance between cases falling under article 27 and the case of a newly independent State. Where there is dissolution of a State, a treaty concluded by the predecessor State will have been made on behalf of the State as a whole. It may be presumed to have been made with the consent of the people of all parts of the State and, so long as the State remains in existence, to be binding on the entire State. This is a very different situation from that of a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such. The same observation may be made about the position of a part of a State that breaks away and becomes independent. However, in this case, it is more likely that the part will have been in a position more akin to that of a dependent territory. Indeed, it is quite possible that the attempt to impose the application of a particular treaty may be the cause of the secession of part of the State.

402. Whether in the case of a dissolution of a State the principle of continuity or the clean slate principle should apply is a question that the Commission will have to consider with care. For his own part, the Special Rapporteur finds it difficult to form a clear-cut view one way or the other. However, on balance, having regard to considerations such as those mentioned in the preceding paragraphs including, in particular, the desirability of maintaining the continuity and stability of treaty relationships wherever possible, he would be inclined to maintain article 27 and the distinction drawn between that article and article 28.

(c) *Details of the draft article*

403. Only the comments of the Egyptian delegation and the Netherlands Government touch on the drafting of the article. So far as the comments of the Egyptian delegation criticize the breadth of the exception in paragraph 2 of article 27, the Special Rapporteur has nothing to add to the observations made in connexion with article 26.[302] The question of drafting raised by the Netherlands Government is related to article 28 and will be considered in connexion with paragraph 1 (*b*) of that article.

(d) *Completion of signature*

404. As indicated above,[303] the comments of the Netherlands Government have the effect of raising the question whether the provisions of articles 13, 14, 15 and 16 should be applied to cases falling under articles 26 and 27. In connexion with article 26, the position with respect of each of those articles was considered in turn.[304] The tentative conclusion reached was that while it might be appropriate to adapt the provisions of article 13 for the purposes of cases falling under article 26, it would not be appropriate to do so as regards articles 14, 15 and 16.

405. This conclusion was based mainly on the nature of *ipso jure* continuity and, although the circumstances are different in cases falling under article 27, essentially the same considerations seem to apply. Accordingly, the Special Rapporteur is of the opinion that while the provisions of article 13 might be adapted for the purposes of cases under article 27, this course would not be advisable with respect to articles 14, 15 and 16.

Article 28. Separation of part of a State

Comments of Governments

Oral comments

406. *France.* The French delegation wondered what compelling technical reasons had led the Commission to distinguish in its draft between what it termed "newly independent States" and States emerging from the "separation" of a State. That was a vague extra-juridical concept, and the fact that the Commission had finally adopted an identical solution for both cases meant that there was even less justification for it. The Commission would probably have been well advised to concentrate on legal concepts that were more commonly used in international legal terminology and particularly on the problems which might arise in the case of a protectorate, mandate or trusteeship agreement.[305]

Spain. The Spanish delegation commented that the concept of identity or continuity of the State, as a concept opposed to that of succession, appeared only in article 28, and that the Commission could consider the possibility of examining the idea of continuity in a more general context.[306]

Belgium.[307]

Zambia.[308]

Written comments

407. *Netherlands.*[309]

United Kingdom. The United Kingdom Government considered that paragraph 1 of the article should be included in part III which could be broadened to cover successor States which were not newly independent. Paragraph 2 would become unnecessary if the definition proposed in the United Kingdom comments for the term "newly independent State" (article 2, paragraph 1 (*f*)) were adopted.

United States of America.[310]

[302] See paras. 376-378 above.

[303] See paras. 382-383 above, under article 26.

[304] See paras. 385-389 above.

[305] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1318th meeting, para. 14.

[306] *Ibid.*, 1320th meeting, para. 24. See also para. 353 above, under article 25.

[307] See para. 364 above, under article 26.

[308] See para. 390 above, under article 27.

[309] See para. 391 above, under article 27.

[310] *Ibid.*

Observations and proposals of the Special Rapporteur

408. In the comments made by delegations and Governments, there is no challenge to the principles underlying article 28. Indeed, as already observed under article 27, if anything the comments have tended to suggest that the case of new States resulting from the dissolution of a State should be treated in the same way as parts emerging by separation from a State.

409. However, in connexion with article 28, a number of comments suggest in effect that a new State resulting from separation should be treated as a "newly independent State". The comments of the French and Belgian delegations, and the United Kingdom and United States Governments, are in that sense. As expressed in the comments of the United States Government, the suggestion is that the concept of "newly independent State" is broad enough to encompass the separation of part of a State in all those cases in which application of the rules in part III is indicated. The implication of these comments seems to be that article 28 should be absorbed into the provisions of part III and that the definition of "newly independent State" in paragraph 1 (*f*) of article 2 should be amended accordingly. In fact the United Kingdom Government have suggested an amendment to the definition, designed to cover this point. That Government has suggested the substitution of the words "part of the territory of the predecessor State" for the words "a dependent territory for the international relations of which the predecessor State was responsible".

410. Earlier in the present report,[311] the Special Rapporteur suggested that the Commission should postpone a decision on this comment of the United Kingdom until it had dealt with article 28. If the Commission decides to maintain article 28 as a separate article distinct from part III of the draft, then the United Kingdom amendment will hardly require further consideration. If, on the other hand, the Commission decides to incorporate article 28 in part III, then in due course the amendment suggested to article 2, paragraph 1 (*f*) will fall to be considered. In other words, the definition should follow the decision of substance and not *vice versa*.

411. The French delegation also suggested that the Commission should concentrate on problems which might arise in the case of a protectorate, mandate or trusteeship agreement. These, however, are matters raised for consideration in 1972 by what was article 18, submitted by the previous Special Rapporteur, which the Commission did not approve. At this stage, the Special Rapporteur does not consider that this question should be re-opened.

412. In connexion with the general question raised by the comments, the Special Rapporteur would refer to that part of the present report which deals with the arrangement of the draft articles, and in particular to the last paragraph of his own observations.[312] It is there observed that paragraph 1 of article 28 clarifies the position of the State which survives where part of its territory becomes a State by separation, and that the cases dealt with in part III of the draft articles are different from those dealt with in article 28. Part III is concerned with new States that were formerly *dependent* territories, whereas article 28 is concerned with new States which were formerly an integral part of the territory of a State. The provisional view was expressed that during the process of drafting it seemed to be advisable to deal with the two cases separately.[313]

413. On reflection, in the light of the comments of Governments and of the commentaries and the deliberations of the Commission, the Special Rapporteur sees no reason to alter that provisional view. Even though it is true that the provisions with respect to "newly independent States" are applied by article 28 to States emerging by separation from an existing State, the cases are essentially different because of the pre-independence status of the territories. Whatever the apparent logic may be in support of combining article 28 with part III of the draft, the Special Rapporteur considers that it would be better in the present draft articles to maintain article 28 as a separate provision.

414. The only other comment on article 28 which seems to require consideration is the amendment to paragraph 1 (*b*) suggested by the Netherlands Government. The Netherlands Government said that several treaties of the Kingdom had been concluded or denounced in respect of only one or two of the component parts and that this was mentioned in the instrument of ratification or denunciation. If article 28 should be applied to the dismemberment of the Netherlands by the separation of the Netherlands Antilles or Surinam, the Government thought that it was not clear whether the case would be covered by the words in paragraph 1 (*b*)— "1. . . . unless: . . . (*b*) it appears from the treaty or from its object and purpose. . . ". In that respect, it was suggested that the phrasing of article 29 of the Vienna Convention might be better. If this suggestion were adopted, the passage would read: " . . . unless: . . . (*b*) a different intention appears from the treaty *or is otherwise established*".

415. The point, of course, is that the intention that the treaty should relate only to the territory which has become independent on separation would, in the examples mentioned by the Netherlands Government, appear not from the treaty of from its object and purpose but from another source such as the instrument of ratification. The suggestion of the Netherlands Government seems to be reasonable and the Special Rapporteur suggests that it be given serious consideration.

416. Subject to the above observations and to possible points of drafting, the Special Rapporteur proposes that article 28 should be approved by the Commission.

[311] See para. 138 above.

[312] See paras. 62-65 above.

[313] See para. 65 above.

PART V

BOUNDARY RÉGIMES OR OTHER TERRITORIAL RÉGIMES ESTABLISHED BY A TREATY

Article 29. Boundary régimes
Article 30. Other territorial régimes [314]

Comments of Governments

Oral comments

417. *Afghanistan.* The delegation of Afghanistan said that, while parts I to IV of the draft articles were a good basis for a convention, some of the proposed articles should be reviewed; for example, those in part V which dealt with boundary régimes. In the view of the delegation, that was a topic which was not germane to State succession and which might lead to the establishment of an unclear rule in that sector of law that could give rise to politically explosive situations.

The delegation, clarifying its position with regard to articles 29 and 30, said that if it was true, as the Commission had stated in its commentary on those articles, that the question of territorial treaties was at once "important, complex and controversial",[315] then there was no need in the present circumstances to deal with that question, to which a solution could easily be found by political accommodation between the parties concerned. The permanency of boundary treaties and succession thereto by other States could not be recognized if the treaty was not lawful, in the first place, and if its continuation was a source of tension and instability. Moreover, certain other kinds of territorial treaties, such as treaties concerning international waterways or treaties on fisheries, must be dealt with separately. The delegation noted that eminent jurists, such as Lord McNair and Sir Gerald Fitzmaurice, had been cautious on that subject. The Committee should bear in mind that modern international law did not give prominence to the real right attached as such to the territory but to the right attached to the people of the territory.

Leaving aside the question of territorial treaties which affected a large number of States and which should be respected in the interests of the international community and referring to the topic of bilateral treaties, Mr. Charles Rousseau had rightly observed that, in the case of boundaries, succession occurred only through the tacit agreement of the neighbouring countries. Where there was a lawful boundary agreement that had the tacit assent of the neighbouring countries, no dispute would occur, but it was not proper for other nations to impose a treaty against the wishes of the State concerned or contrary to the principle of *rebus sic stantibus*, where such treaty might validly be terminated.

If other jurists had been cautious, if the International Law Association had avoided making a distinction between treaties of a territorial character and other kinds of treaties, the Committee should not rush to establish rules which might create problems. The reference to article 62, paragraph 2 (*a*), of the Vienna Convention, which appeared in the Commission's commentary on articles 29 and 30,[316] made it clear that a very large majority of the States at the United Nations Conference on the Law of Treaties had endorsed the view that treaties establishing a boundary were an exception to the fundamental change of circumstances rule; at that Conference Sir Humphrey Waldock had explained that the exception provided for in paragraph 2 (*a*) in no way hampered the independent operation of the principle of self-determination and other valid principles. Once again, however, the attempt to apply paragraph 2 (*a*) in a different context, in the drafting of article 29, would create more problems than it would solve.

In the Commission's commentary on articles 29 and 30,[317] reference was made to article III, paragraph 3, of the Charter of the Organization of African Unity, which maintained the principle of respect for sovereignty and territorial integrity of each State. If that Charter stressed the importance of maintaining African boundaries, that was because those boundaries had originally been established to serve the interests of the colonial Powers and because, if those boundaries were touched, the whole African fabric would shatter; however, that was a principle which applied to a special case and which did not necessarily apply to the rest of the world. The delegation further observed that in Latin America most boundary disputes had been settled by arbitration and that one could not say, in the circumstances, that the old principle of *uti possidetis* had been applied. For its part, the delegation shared the view of those writers on the topic who considered that questions relating to international boundaries should be settled by arbitration. In the delegation's view, a boundary was not a geometrical line but an area inhabited by millions of people whose sentiments and right to self-determination should be respected. In view of the political and psychological aspects of the question, the Committee should carefully consider part V of the draft, which dealt with boundary régimes.[318]

France. The French delegation believed that for the principle of the absence of any general obligation upon the successor State to consider itself bound by treaties concluded by its predecessor to be acceptable, it was essential that certain types of treaties should be regarded as having binding force on the successor State. The only treaties of that kind which the Commission had included in articles 29 and 30 of its draft were treaties relating to boundary régimes and other forms of territorial régimes; the question arose whether the Commission should not have considered placing other types of treaties in that category.[319]

Australia. The Australian delegation said that in articles 29 and 30 the Commission had reflected the accepted rule of international law concerning boundary

[314] So many of the comments referred to both articles 29 and 30 that it seemed convenient to set out the comments on those articles together.

[315] Para. 1 of the commentary.

[316] Para. 10 of the commentary.

[317] Para. 11.

[318] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1318th meeting, paras. 4-8.

[319] *Ibid.*, para. 13.

régimes or other territorial régimes established by treaty. In the delegation's view, it was highly desirable not to affect treaties establishing such régimes simply because a case of State succession had occurred. The guiding philosophy which should be followed was that of preserving peace and tranquillity.[320]

Finland. The Finnish delegation said that articles 29 and 30 were unobjectionable, but the drafting of article 30 could be condensed so as to avoid pointless repetition.[321]

Greece. The Greek delegation considered that articles 29 and 30 should be retained since they reflected positive international law in the matter.[322]

Spain. The Spanish delegation, without challenging the fundamental considerations on which the Commission had based articles 29 and 30, felt that it should give the delicate problem of territorial régimes more detailed study and elaborate on its conclusions, which were now drafted in a purely negative form. Those articles should be considered within the context of the draft as a whole and, in particular, article 6.[323]

Denmark. The Danish delegation was able to accept, in principle, the provisions of articles 29 and 30.[324]

India. The Indian delegation said that part V of the draft articles embodied the accepted legal principle of respect for established boundaries and constituted a useful supplement to article 62 of the Vienna Convention.[325]

Cuba. The Cuban delegation said that part V contained a general exception to the clean slate principle in respect of so-called territorial treaties, in accordance with the traditional theory that such treaties were not affected by a succession of States. Thus, article 29 contained provisions analogous to those of article 62 of the Vienna Convention as exceptions to the principle *rebus sic stantibus*. Article 30, however, went much further by stipulating that a succession of States did not as such affect obligations relating to the use of a particular territory, and the Cuban delegation believed that the scope of the provision should be made clear because, with its present wording, it seemed to apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. It was unacceptable to the delegation that succession should not affect such treaties because, in the case of a radical change in the sovereignty of a State, there could not be continuity in respect of responsibilities of that kind.[326]

Liberia. The Liberian delegation was happy to note that the clean slate principle had not been given a sweeping interpretation, because otherwise some of the benefits to be achieved by the attainment of independence would have been lost. For example, with regard to treaties establishing a legal bond attaching to a territory, third States bound by such treaties with the predecessor State would necessarily have had to enjoy a similar freedom to the detriment of the international position of the new State, which might have found certain doors closed to it. The latter had, for its part, an obligation to respect, for example, boundary régimes established prior to its accession to independence as well as customary rules or international law in the same way as all other members of the international community. In any event, the attainment of sovereignty conferred upon the new State the right to review and change, within the scope allowed by international law, questions affecting its national interests and all treaties, including dispositive treaties.[327]

Ghana. Regarding the question of boundary régimes and other territorial régimes, the delegation of Ghana supported most of the views expressed by previous speakers.[328]

Egypt. The Egyptian delegation said that it could understand why the Commission had singled out boundary régimes and other territorial régimes for separate treatment. Yet the Commission tended to take the view that it was not the treaties themselves which constituted a special category so much as the situations resulting from their implementation, and that it was not so much a question of succession in respect of the treaty itself as of the boundary or other territorial régime established by it. Accordingly, the Commission had drafted those two articles from the standpoint that the question was not the continuance in force of a treaty but that of the obligations and rights which devolved upon a successor State. It could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations. Even if that question could be satisfactorily answered, the solution would beg the question whether it would not be more appropriate to include the relevant provisions in the draft articles pertaining to State succession in respect of matters other than treaties.[329]

El Salvador. The delegation of El Salvador said that the Commission had decided that succession of States should not affect treaties establishing a boundary or obligations and rights established by such a treaty and relating to the régime of a boundary. A similar reservation was provided in the case of treaties concerning the use of a particular territory or restrictions upon its use. That was a matter of particular importance to El Salvador in view of the growing movement towards Central American economic, social and cultural integration which was taking place within the framework of the Organization of Central American States. All the countries involved in that integration movement had, in the course of their existence and by virtue of their sovereignty, concluded multilateral and bilateral treaties which would be given legal endorsement by provisions such as those contained in the draft articles.[330]

[320] *Ibid.*, 1319th meeting, para. 7.

[321] *Ibid.*, 1320th meeting, para. 3.

[322] *Ibid.*, para. 9.

[323] *Ibid.*, para. 28.

[324] *Ibid.*, 1321st meeting, para. 34.

[325] *Ibid.*, para. 46.

[326] *Ibid.*, 1322nd meeting, para. 4.

[327] *Ibid.*, para. 24.

[328] *Ibid.*, para. 36.

[329] *Ibid.*, 1323rd meeting, para. 3.

[330] *Ibid.*, para. 12.

Kuwait. While endorsing the clean slate principle, the delegation of Kuwait felt that it should not apply to boundary treaties.[331]

Romania. The Romanian delegation expressed the view that it would be appropriate to adopt a criterion of general scope which could be applied to all treaties. Accordingly, the delegation felt some misgivings concerning the solution adopted by the Commission, namely to provide for a series of departures from the application of the principle of self-determination in respect of certain categories of treaties—the so-called "localized" treaties. Contrary to the Commission's belief that in certain circumstances other principles should take precedence over the clean slate rule, the delegation felt that the principle of self-determination had the character of *jus cogens* and that no departures from it were admissible. For those reasons, the delegation found the solutions provided in articles 29 and 30 of the draft to be questionable. Furthermore, the Commission itself, in its commentary on those articles,[332] recognized that the solution adopted would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. That very reasoning pointed to the need to apply consistently and in all cases the principle of self-determination, rather than introducing an artificial distinction between the succession of States in respect of treaties and the possibility of States requesting the eventual revision or termination of such treaties. Nor was the analogy with the Vienna Convention convincing. The delegation failed to understand how the emergence of a new State resulting from the liberation of a people from colonial domination could be regarded as a fundamental change of circumstances within the meaning of article 62 of that Convention. Furthermore, certain provisions of article 30 would have the effect of imposing on a successor State the obligation to respect the advantages granted to other States by the former colonial Power. The appropriate solution would be to provide that the successor State, by virtue of good-neighbourly relations, could maintain facilities granted to neighbouring or other States in its territory—for instance, the right of transit—only to the extent that it deemed the maintenance of such facilities to be consonant with its sovereignty and its right to dispose of its natural resources.[333]

New Zealand. In the view of the New Zealand delegation, the approach taken by the Commission in the draft articles, which related to boundary régimes and other territorial régimes established by a treaty, was unavoidable. In that area above all others, stability was so important as to override other considerations. It was, however, open to doubt whether the Commission had finally resolved the doctrinal issue which had clearly perplexed it: whether the rules in articles 29 and 30 should be formulated in terms of the boundary or régime resulting from the dispositive effects of a treaty, or whether they should relate to succession in respect of the treaty.[334]

Nigeria. With regard to the boundary régimes dealt with in part V of the draft articles, the Nigerian delegation said that the diversity of opinions made it difficult to see on what basis international law placed territorial treaties in a special category for the purposes of the law applicable to succession of States. Further progress should be achieved in that area, in the light of the African States' peculiar position deriving from their former colonial status, and the desire to preserve peace should be the basic criterion.[335]

Kenya. The delegation of Kenya was in full agreement with the tenor of article 29. Kenya's unilateral declaration showed that it had a clear understanding of the effects of its succession to the territory formerly administered by the United Kingdom and to the agreement relating to that territory. On the other hand, the delegation said, article 30 should not be placed on the same footing as article 29 and the question of other territorial régimes should be dealt with separately. Treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States. What could be said to survive the succession were rights and interests created by usage, which could be the subject of new arrangements on the basis of the principle of good neighbourliness.[336]

Canada. The Canadian delegation said that articles 29 and 30 on boundary régimes and other territorial régimes reflected the attitude of Canada on this subject.[337]

Pakistan. The Pakistan delegation said that the clean slate doctrine was bound to have exceptions, because a successor State did not come into existence in a vacuum: such a State had its own will and was entitled to exercise it, but there were realities which did not depend upon its will. The terrain of the territory of such a State and the area of the territory in which it replaced the predecessor State, for example, were such realities. The territory was the body which it had inherited; all that was tied up to the territory was unalterable by reason of succession only. Inherent in the concept of replacement was that of the continuity of the same territory. When a new State came into existence in a territory, the territory remained the same, only the State changed.[338]

United Republic of Tanzania. Having expressed approval for the adoption by the Commission of the clean slate principle, the Tanzanian delegation said that on the question of territorial treaties the Commission had been hesitant to draw what was, in the delegation's view, the logical conclusion, namely that the Administering Authority of a Trust Territory could not conclude a treaty on behalf of the Trust Territory so as to bind it in perpetuity. In respect of Tanganyika, for example, the United Kingdom, as the Administering Authority of the

[331] *Ibid.*, para. 16.

[332] Paras. 16 and 19.

[333] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1323rd meeting, para. 21.

[334] *Ibid.*, para. 31.

[335] *Ibid.*, 1324th meeting, para. 3.

[336] *Ibid.*, para. 9.

[337] *Ibid.*, para. 16.

[338] *Ibid.*, 1325th meeting, para. 22.

Trust Territory, had had no power to grant a lease in perpetuity because the trusteeship had not been in perpetuity.[339]

Zambia. As to the draft articles relating to boundary régimes and other territorial régimes established by a treaty, the Zambian delegation said that the Commission, in a laudable effort from the standpoint of ensuring peace and tranquillity, had adopted provisions which belied not only existing facts, but also appeared to cut across the principles of self-determination, equal rights and the sovereign equality of States that underlay the remainder of the draft. Colonial frontiers had been drawn up for strategic or economic reasons without any regard for geographic or ethnic considerations. The fact that most States members of the Organization of African Unity had pledged themselves to respect the borders existing on their achievement of national independence did not necessarily mean that the measure, which they had adopted in the interests of stability in Africa, should be consecrated as a rule of international law. Under both the Vienna Convention and international customary law, a State could only be bound by a treaty through an act of will establishing consent to be bound. That rule was applicable in respect of boundaries and territorial régimes. Furthermore, a question arose as to whether, in the case of the accession of a State to independence, the change of circumstances was not so fundamental that the exception for which provision was made in article 62, paragraph 2 (*a*), of the Vienna Convention should not be applicable. That did not mean that all territorial treaties should be considered lapsed. Yet it was certain that the question should be re-examined with a view to the formulation of rules in keeping with current realities and in harmony with widely accepted rules of international law.[340]

Morocco. The delegation of Morocco said that the wording of some of the draft articles should be clarified, particularly that of article 30, and provision should be made for arbitration in the event that the rules laid down in articles 29 and 30—which appeared to favour the disputed principle of the intangibility of boundaries—conflicted with the principle of self-determination of the peoples involved or were disputed by a State, as in the case of certain parts of Asia particularly, declaring itself not bound by a treaty considered to be unequal. The role played by arbitration and conciliation in boundary conflicts both in Latin America and, in a more limited way, in Africa should not be underestimated. It would probably be easier to find an appropriate solution for each particular problem that might arise in that field through arbitration rather than through the rigid framework proposed by the Commission.[341]

Guyana. The delegation of Guyana was not persuaded that the criticisms which had been advanced in relation to the boundary régime provisions of article 29 were well conceived. In the delegation's view, those provisions made sense not only in themselves but also with respect to the many instances of State practice given in the commentary. It had been argued that a succession of States was a fundamental change of circumstances which should be opposable to the continuance of a boundary established by treaty, regardless of the contrary provisions of article 62, paragraph 2 (*a*) of the Vienna Convention. It had also been maintained that the continuance of such a boundary in the case of a newly independent State was inconsistent with the right to self-determination and the clean slate principle which derived from it. It was not clear to the delegation how a succession of States could properly constitute a fundamental change of circumstances. If it was really true that the question of a fundamental change of circumstances could arise only between two States which had a subsisting treaty relationship, the problem at succession was not whether a fundamental change had occurred in a subsisting treaty relationship between the two States, but whether such relationship was still in existence. That there was some relationship could hardly be denied in the light of past practice. The argument that a succession was a fundamental change of circumstances which released the successor State from all obligations of the treaty was equally unacceptable. Such treaties were made in full awareness that political control was transmissible and often transmitted. Thus, the very logic of the situation required that the treaties should endure, regardless of any transmission of political control over any part of a particular territory. It was, therefore, artificial to seek to divorce the question of succession of States from the essential framework of the Vienna Convention in particular article 62, paragraph 2 of the Convention, which provided that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty; "(*a*) if the treaty establishes a boundary . . .". The rule set forth in the Commission's draft was obviously analogous, but it should be noted that the Commission had been careful to avoid saying that a succession of States was a fundamental change of circumstances and that it had simply referred, in the commentary on articles 29 and 30,[342] to the considerations which had led it to make that exception to the fundamental change of circumstances rule. The various instances of State practice set out in the commentary amply supported the distinction made in the draft articles between a boundary treaty as such and the boundary régime derived from it. Boundary treaties, which were intended to define the limits of sovereignty throughout the world, must be capable of enduring, regardless of any transfer of sovereignty. It seemed, in fact, that sovereignty could be transferred only on the basis of the boundaries which defined it.

As to the contention that article 29 ignored the principle of self-determination, it was not a question of the status of the principle, which was one of *jus cogens*, but of its scope. The principle of self-determination could not be extended to the point or removing the very foundation of the existence of the new State from the moment of its creation. Were it otherwise, the old colonial world would have become an unbounded chaos. No one maintained that such a birthright should be the con-

[339] *Ibid.*, para. 28.

[340] *Ibid.*, 1326th meeting, para. 11.

[341] *Ibid.*, para. 19.

[342] Para. 10.

sequence of the exercise of the right of self-determination. The Organization of African Unity had wisely perceived that the newly independent States would be the last to benefit from such an interpretation of the right to self-determination. It was clearly preferable to choose continuity, which offered them stability and strengthened world security.[343]

Bulgaria. The Bulgarian delegation said that the Commission had been correct in article 11 in adopting the "clean slate" principle as a general rule. Articles 29 and 30 could be regarded as an exception to the rule. It was well-known that the boundaries established by the colonial Powers had served only their interests. It was also true that, if the clean slate principle was applied strictly to boundaries and boundary régimes, it might give rise to international disputes. The delegation was inclined to favour the rules adopted by the Commission because they were designed to protect both the interests of the newly independent countries and those of the international community as a whole.[344]

Venezuela. The Venezuelan delegation commented as follows:

The codification of the question of boundary régimes and other territorial régimes established by a treaty was probably the most sensitive area of all. Article 29 stated categorically that a succession of States should not as such affect: (*a*) a boundary established by a treaty; or (*b*) obligations and rights established by a treaty and relating to the régime of a boundary. Obviously, territorial treaties were of special international significance and, in many cases, were a continuous source of profound differences and confrontations, which were not always peaceful. Article 62 of the Vienna Convention had been adopted by 93 votes to 3, with 9 abstentions. That made it very clear that the international community tended to the position that a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty, if the treaty established a boundary. During the United Nations Conference on the Law of Treaties, there had been much comment, however, on the scope and application of principles such as *rebus sic stantibus, pacta sunt servanda, jus cogens* and self-determination. It had been made clear that the intention had not been to give the impression that boundaries could not be changed, although article 62 of the Vienna Convention did not afford any grounds for terminating a boundary treaty. The issue having been translated to the context of succession of States, the Commission had stated in paragraph 10 of the commentary on articles 29 and 30 that the considerations which had led it and the Vienna Conference to make that exception to the fundamental change of circumstances rule appeared to apply with the same force to a succession of States. It had further pointed out, in paragraph 15 of the commentary on that article, that there were a number of other modern instances in which a successor State had become involved in a boundary dispute and that in those instances the succession of States had merely provided the opportunity for reopening or raising grounds for revising the boundary which was independent of the law of succession. In paragraph 16 of the commentary, the Commission pointed out that the provision would relate exclusively to the effect of the succession of States on the boundary settlement and that it would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty and, finally, that the mere occurrence of a succession of States would not consecrate the existing boundary if it was open to challenge.

He pointed out that, during the Conference and during the current debate, various delegations had taken the firm position that the concept of a régime established by treaty necessarily implied that the treaties had been concluded lawfully, free from any pressures or influences flowing from the circumstances of their conclusion—in other words, that only just and equal treaties were covered by the provisions in question. In the context of the draft articles, therefore, it was the view of the Venezuelan delegation that, in the light of all those considerations—which were the background against which the letter and spirit of sub-paragraph (*a*) of article 29 should be understood—the expression "as such" at the beginning of the article was a clear indication that, whether it referred to succession in respect of a boundary or in respect of a treaty, all territorial claims which had arisen prior to the succession were maintained and their validity was unaffected, in accordance with the precedent established on the occasion of the conclusion of the Agreement between the United Kingdom and Venezuela to which he had referred. That statement of principle did not rule out the possibility that the Venezuelan Government, in transmitting its observations on the draft articles, would make specific proposals with regard to the more accurate determination of the scope of article 29 or any other article.[345]

Somalia. Commenting in the General Assembly on the report of the Commission [346] and the report of the Sixth Committee thereon,[347] the delegation of Somalia said that some of the draft articles required clarification and also contained specific questions of direct concern to Somalia. Therefore, the delegation entered strong reservations on behalf of the Government of Somalia, particularly with regard to the part relating to the boundary régime and other territorial régimes established by treaty.

Stating how the Government of Somalia considered the treaties of which the report spoke, the delegation said:

The Somali Democratic Republic does not recognize the legal validity of treaties concluded between other parties against the interests and without the consent of its people. As far as my country is concerned, we consider these treaties devoid of any legality since they were stipulated between foreign colonial Powers without the supreme will, or even the knowledge, of our people. The treaties to which the report refers with regard to my country are probably the 1897 Anglo-Ethiopian Treaty,[348] the 1908 Italo-Ethiopian Treaty [349] and the 1924 Anglo-Italian Treaty,[350] none of which the Somali Democratic Republic recognizes for the reasons I have just stated.

It is common knowledge that such treaties were meant to serve solely the interests of the colonial Powers. The distinguished jurists who so laboriously prepared this extensive report know that colonial peoples were not required to give, and in fact had not given, their

[343] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1326th meeting, paras. 26-27.

[344] *Ibid.*, para. 45.

[345] *Ibid.*, 1327th meeting, paras. 22-23.

[346] See foot-note 3 above.

[347] See foot-note 4 above.

[348] G. F. de Martens, ed., *Nouveau Recueil général de traités*, 2nd series, vol. XXVIII (Leipzig, Dieterich, 1902), p. 435.

[349] G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. II (Leipzig, Dieterich, 1910), p. 121 (English text in *British and Foreign State Papers, 1907-1908*, vol. 101 (London, H. M. Stationery Office, 1912), p. 1000). Article 4 of the 1908 Treaty refers to " the line accepted by the Somali Government in 1897 ". References to that line may be found in *The Somali Peninsula* (Information Services of the Somali Government, 1962), pp. 59 *et seq.* and " Report of the Italian Government on the progress of direct negotiations between the Governments of Ethiopia and of Italy concerning the delimitation of the frontier between the Trust Territory of Somaliland under Italian administration and Ethiopia " (*Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 40, document A/3463).

[350] League of Nations, *Treaty Series*, vol. XXXVI, p. 379.

consent to such arbitary treaties. Furthermore, these treaties have, especially in Africa, caused tremendous problems to many new nations. They have created fatal misunderstandings, and have even led to serious conflicts among neighbouring States. The Somali Democratic Republic is ready, however, to assume full obligations under present-day international law in conformity with the principles of the Charter of the United Nations vis-à-vis treaties entered into freely by us with any other party or parties. In fact, when the historic event of our revolution took place on 21 October 1969, the Supreme Revolutionary Council of my country announced in its first declaration the basic guidelines of the general programme of the Revolutionary Government, both in terms of internal and external policies. Article 6 of part II of that declaration states that the Somali Democratic Republic recognizes and respects all legal international commitments undertaken by the Somali people.

The report now before us makes some comments on boundary disputes between States, and in a specific reference to my country mentions the boundary disputes between the Somali Democratic Republic, Ethiopia and Kenya. Indeed, there are outstanding boundary disputes between the Somali Democratic Republic and its neighbouring States, disputes for which we are seeking friendly and peaceful settlement. The President of the Supreme Revolutionary Council of my country, Major General Mohamed Siad Barre, said in a recent policy statement with regard to this question:

> "What we intend to do is to press for peaceful and amicable settlement of all disputes with our neighbours, which, if left unresolved, will sow the seeds of suspicion and hatred between the peoples and Governments of our part of the world."

Thus, the Somali Democratic Republic has chosen to resort to the policy of pacific settlement of disputes between States as laid down in the Charter of the United Nations and in the Charter of the Organization for African Unity to demonstrate its genuine desire for peace in our region.

As regards the question of our borders with Ethiopia, I wish to make it clear that they are provisional administrative boundaries pending their final demarcation and the solution of the dispute. In a letter dated 15 March 1950 addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister for Foreign Affairs of Italy, referring to the unilateral extension of the provisional administrative line, wrote:

> "It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document,[351] and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government, that as the retiring Administering Authority the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.
>
> "The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted, and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question but also to certain practical difficulties which may arise from the line so fixed." [352]

The Somali Democratic Republic has, ever since its independence and admission to membership in the United Nations, insisted on those same reservations which were expressed by the Italian Government, in its capacity of the Administering Authority, 22 years ago.[353]

Ethiopia. The delegation of Ethiopia said:

My delegation voted in favour of the draft resolutions on the report of the International Law Commission. I am taking the floor not so much to explain my vote with regard to those draft resolutions as to reserve the right of my delegation, particularly in view of the statement made by the representative of Somalia, regarding some treaties validly entered into between two sovereign States: Ethiopia and the sovereign authority in the Territory formerly known as Somaliland.[354]

Kenya. In explaining its vote, the delegation of Kenya said:

We should like to reiterate our position in connexion with draft article 29 on boundary régimes. We fully subscribe to the conclusions of the International Law Commission in that article. A State can only succeed to the territory previously held by its predecessor. In our opinion this has nothing to do with the exercise of self-determination: it is purely a matter of one State succeeding to the sovereignty formerly exercised by another State over a given territory.

The inviolability of existing treaties has been fully recognized and enshrined in the Charter of the Organization of African Unity; it is a principle which the International Law Commission has also endorsed; and it is the guiding principle of the Government of Kenya.

As far as the Kenya-Somali boundary is concerned, there is absolutely no room for dispute: the boundary was clearly demarcated by the Anglo-Italian Treaty of 1924, and we stand by that boundary—not because it was concluded by the colonialists, but because it clearly spells out the areas of sovereignty of the two States. Our full position on this subject was reiterated in the statement we made before the Sixth Committee [355] which we should like to incorporate by reference into the record of this meeting.[356]

Afghanistan. The delegation of Afghanistan said that the draft articles could serve as a basis for the preparation of a convention if part V on boundary régimes was left out, as that question did not relate to succession of States.

The delegation was of the opinion that, at the present stage of the development of international law, it was not necessary to deal with the questions covered by articles 29 and 30, which the Commission considered to be a complex and controversial matter. These questions might be better and more easily resolved through political arrangements between the parties concerned. Treaties defining frontiers should exclude the rule of fundamental change of circumstances. Since a frontier was only an imaginary line separating peoples, the right of peoples to self-determination must be respected. The Commission should, therefore, pay particular attention to draft articles 29 and 30 in a spirit of respect for the principles of human liberty and freedom of choice in order not to contribute to the creation of legal situations which did not correspond to tangible and obvious realities. The delegation hoped that the Commission would take its views into account in its future work on succession of States in respect of treaties.[357]

[351] " Negotiation and adoption of a draft trusteeship agreement for Italian Somaliland: letter dated 1 March 1950 received by the President of the Trusteeship Council from the Permanent United Kingdom representative on the Trusteeship Council " (*Official Records of the Trusteeship Council, Sixth Session*, Annex, vol. I, p. 112, document T/484).

[352] *Ibid.*, p. 114, document T/527.

[353] *Official Records of the General Assembly, Twenty-seventh Session, Plenary Meetings*, 2091st meeting, paras. 9-12.

[354] *Ibid.*, para. 31.

[355] *Ibid., Sixth Committee*, 1324th meeting, paras. 5-11.

[356] *Ibid., Plenary Meetings*, 2091st meeting, paras. 32-34.

[357] *Ibid., Twenty-eighth Session, Sixth Committee*, 1406th meeting, paras. 62 and 64.

Written comments

418. *Czechoslovakia.* The Government of Czechoslovakia said that it would be suitable to amend the formulation of article 30 so as to make it evident that the provision concerned territorial régimes that served the interests of international co-operation and were in accordance with international law and the United Nations Charter and to exclude any misapplication of the article in favour of régimes established by treaties based on inequality of rights.

German Democratic Republic. The Government of the German Democratic Republic fully supported the automatic succession into boundary treaties as provided for in article 29. The same held true for the same principle in respect of other territorial régimes as contained in article 30. As far as article 30 was concerned, it had to be added, however, that the present version was not satisfactory because practically it might be used to justify the existence of those territorial régimes which had come into being and continued to exist on the basis of unequal treaties. In the Government's view, that article should, therefore, be supplemented to the effect that its provisions would regulate State succession only in the case of territorial régimes which served the interests of peaceful international co-operation in accordance with the purposes and principles of the Charter of the United Nations.

Netherlands. The Netherlands Government agreed that certain treaties, fixing territorial régimes, should be inherited by the successor State. It pointed out, however, that the reasons why that was desirable applied not only to *territorial* arrangements but also to certain treaties containing rules in respect of the fundamental legal position of the *population* of the territory in question, like treaties with respect to minorities, the right to opt for a particular nationality, and other treaties guaranteeing fundamental rights and freedoms to the population of the territory which was involved in a change of sovereignty.

Poland. The Government of the Polish People's Republic considered that treaties relating to certain territorial problems and, in particular, those establishing State boundaries were a category apart, not affected by cases of succession. These treaties constituted a specific category in international law—also in respect of succession of States. The principle of absolute continuity in respect of the boundary treaties—in the field of succession—was a consequence of the existence in international law of the *jus cogens* rule which made it mandatory to respect the territorial integrity of States. It was the Government's view that that principle, expressed in article 29 of the draft, also corresponded with the best interests of the newly independent States. At the same time, that principle, duly safeguarding the most vital interests of third States, thereby served the international community as a whole. The Government firmly supported the inclusion of that principle in the future convention on succession of States in respect of treaties.

Somalia. With reference to the articles in part V of the draft and the commentaries on them, the Government of the Somali Democratic Republic stressed the need for accuracy as to both the historical record and the legal interpretations of the Somali-Ethiopian and Somali-Kenyan territorial disputes which appeared in the report of the Commission,[358] and commented as follows:

It should be stated at the outset that the main position of the Somali Democratic Republic with regard to the draft articles on treaties and boundary régimes is that it does not recognize the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people.

A brief account of the background and the circumstances leading to the division of the Somali people by imperial powers during the colonial period will serve to clarify this position. Long before the era of colonization, the Somali people constituted a single national entity. Being a homogeneous people with a common culture, language and faith, and inhabiting a recognized area of land, they were able to maintain their national identity and their traditional heritage in the Somali Peninsula.

With the opening of the Suez Canal in 1869, the horn of Africa assumed considerable strategic importance to the European powers. Between 1865 and 1892 France established a foothold around the port of Djibouti, French Somaliland; in 1887 Britain established a protectorate to the east of Djibouti and in 1908 Italy established its claim to other parts of the Somali Coast. An additional factor in this situation was that Ethiopia was also at that time seeking to expand its frontier. To avoid increasing friction over their respective spheres of influence, it became expedient for the European powers to attempt to fix the inland borders of the protectorates they had established.

The report of the International Law Commission refers to treaties that were drawn up with regard to Somali territory in the colonial period. The relevant treaties were those of 1897 and 1908 [359] between Ethiopia and Italy and that of 1897 between Ethiopia and Britain [360] and the Anglo-Italian Treaty of 1924.[361]

The first two of these treaties, which dealt with the boundaries between Italian Somaliland and Ethiopia called for a marking of the frontier on the ground, but, since this was never carried out, disagreement continued over the exact interpretation of the provisions. The continued dispute over the exact demarcation of the frontier between Ethiopia and Italian Somaliland, and in particular over the Somali territory of Ogaden, led eventually to the invasion of Ethiopia by Italy in 1935.

The Treaty of 1897 between Ethiopia and Britain was concluded through secret negotiations and its implementation involved the ceding to Ethiopia of a large area of Somali territory—the Haud—where Somali nomadic pastoralists had grazed their herds from time immemorial.

The Anglo-Italian treaty of 1924 became the basis of the *de facto* frontier between Italian Somaliland and Kenya. In 1926, the border of Kenya with Ethiopia was demarcated by the colonial powers, and the Northern Frontier District (the NFD), an area exclusively inhabited by Somalis, was included in the territory of Kenya, although it was administered as an entirely separate province.

After the Italians had been ousted from East Africa in 1942 and sovereignty restored to Ethiopia, Britain placed Italian Somaliland under a British Military Administration and for some years retained control over the Haud and Ogaden areas. In 1946 the proposal of Mr. Ernest Bevin, then British Foreign Secretary, that all the Somali territories should be unified under the United Nations Trusteeship system was rejected by certain members of the United Nations. While the former Italian Somaliland became a United Nations Trust Territory under Italian Administration, the British Government placed the Ogaden illegally under Ethiopian administration. The boundary problem remained unsettled and persistent efforts by

[358] See para. 12 of the commentary to articles 29 and 30.

[359] See foot-note 349 above.

[360] See foot-note 348 above.

[361] See foot-note 350 above.

the United Nations Trusteeship Council and the United Nations General Assembly during the 1950s to arrive at a solution, before Somalia became independent, ended in failure.

The boundary dispute between the Protectorate of British Somaliland and Ethiopia also developed to serious proportions and led to the establishment by Britain of a provisional boundary line in 1950, for, with the transfer of the administration of the Haud to Ethiopia, the people of British Somaliland became fully aware of their dismemberment through artificial and arbitrary boundaries.

It is important to emphasize, at this point, that when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial powers for the partition of the Somali people and it has never changed this position.

In all international conferences in which Somalia has participated, the Somali Government has consistently maintained a firm and unequivocal position *vis-à-vis* the Somali territories under foreign domination. Thus, for example, Somalia rejected the Organization of African Unity resolution on the question of frontiers, passed in Cairo on 21 July 1964.[362] The Somali Government also reserved its position with regard to similar resolutions passed by other international conferences, for example, the Non-Aligned Conference held in Cairo in 1964.[363]

The Somali territorial disputes with Ethiopia and Kenya raise some fundamental issues of principle in the field of international law. The arguments put forward by some jurists which hinge primarily on the principle of territorial integrity and the corollary concept of the inviolability of frontiers are not applicable to the Somali case. For one thing, the principle of respect for another's territorial integrity presupposes that the State is in legal possession of that territory. It has always been the stand of the Government of the Somali Democratic Republic that Ethiopia and Kenya are unlawfully exercising sovereignty over Somali territories to which they are not entitled. This is because the *de facto* Somali-Ethiopian and Somali-Kenyan boundaries are based on the provisions of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial powers and the Somali people. Furthermore, the principle of territorial integrity has no application to the Somali case because it is inconsistent with the right of self-determination—an internationally accepted principle which is enshrined in the Charters of the United Nations and the Organization of African Unity and in the Declaration of Non-Aligned Conference.

It should be noted in this context that self-determination is not only a general concept in international relations but is also established as a legal doctrine by Article 1 of the United Nations Charter which makes it one of the purposes of the organization "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Indeed the principle has been given practical application by the United Nations in cases like those of Togo and the Cameroon.

The doctrine of inviolability or sanctity of frontiers is only invoked in cases where the boundaries are demarcated on just and equitable grounds and where such demarcation is based on mutual agreements with the parties concerned.

In this connexion, it should be clearly understood that Somalia's borders with Ethiopia are provisional administrative boundaries pending final demarcation and solution of the dispute. In a letter dated 15 March 1950, addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister for Foreign Affairs of Italy, referring to the unilateral fixing of the provisional administrative line, wrote:

"2. It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document,[364] and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government that as the retiring Administering Authority, the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.

"3. The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question, but also to certain practical difficulties which may arise from the line so fixed . . ." [365]

The International Law Commission appears to have based its comments on the demarcation of frontiers primarily on precedent and on customary international law as reflected by the traditional norms and principles applied by European Powers during the era of colonization. But under present-day international law, the obligations of Members of the United Nations under the Charter of the United Nations prevail over any pre-existing treaty obligations (see Article 103 of the Charter). The Charter recognition of the right to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties.

The legal problems posed by the arbitrary demarcation of boundaries and territorial régimes by the former colonial powers provide the International Law Commission with a golden opportunity to develop an important area of international law on the basis of principles which stem not from an outmoded colonialism but from the Charter itself. It must formulate institutional procedures to deal with the colonial legacy of serious territorial problems, such as Somalia's, which are a threat to the peace and stability of many newly independent countries.

Sweden. The Swedish Government commented that the phrase "a succession of States shall not as such affect" might be reconsidered. It was obvious that boundary régimes and other territorial régimes might be affected by a succession of States. By such a succession a new boundary State might emerge or the territory under a special territorial régime might become part of another (new) State. What was meant was presumably that the successor State was bound by the boundary régime or the territorial régime. If so, the negative formula used should be replaced by some wording affirming that such régimes continue in force in regard to successor States. A similar positive formula was used in article 26 on uniting of States and in article 27 on dissolution of a State, which were based on the same principle of continuity of treaties in relation to the succession of States.

United Kingdom. The United Kingdom Government said that the point in the commentary [366] might with advantage be included in the text of the draft articles. "Territory" should be defined so as to include "all or any part" of a State's territory.

United States of America. The United States Government commented as follows:

Articles 29 and 30 are valuable from the point of view that they seek to avoid permitting the fact of a succession to be used as an argument for exacerbating territorial disputes. The underlying logic is simple and incontrovertible. A successor State can only acquire as its territorial domain the territory and territorial rights of the

[362] AHG/Res.16 (1).

[363] Conference of Heads of State and Government of Non-Aligned Countries.

[364] See foot-note 351 above.

[365] See foot-note 352 above.

[366] Para. 39 of the commentary.

predecessor. If the territory as held by the State had boundaries firmly fixed and settled by treaty with an established and well-working régime for keeping those boundaries delineated then the successor State inherits all this. If the territory as held by the predecessor State included obligations by an upstream riparian State established by treaty to release water from its river dams so as to aid the irrigation projects in the territory, the new State receives its territory with those benefits. On the other hand, if the territory as held by the predecessor State had a poorly-defined boundary as a consequence of a poorly-drafted treaty or was subject to an obligation to control its releases of water to assist irrigation in a downstream riparian State then the successor State acquires what the predecessor had, territory with badly defined boundaries or subject to an obligation to help the downstream State.

Failure to state the rules set forth in articles 29 and 30 would give rise to an assumption that the fact of succession could be used to support claims for territorial change or abolition of territorial rights. The result would be that an effort to codify international law would have resulted in undermining friendly relations among States. The United States, therefore, favours retention of articles 29 and 30.

Article 30, however, would benefit from simplification. The structure and drafting are complicated by a requirement in paragraph 1 that rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This latter requirement seems both unnecessary and unduly confusing. If a land-locked State has transit rights to send certain commodities through a neighbouring State to a port, should it make any difference whether the commodities are grown or manufactured throughout the land-locked State or only in certain areas? Even if grown in a certain area the sale of the commodities benefits the State as a whole as well as the area directly concerned. Consequently, the United States would propose that this requirement be eliminated from the article.

Kenya. The Government of Kenya referred to the statement of the Kenya representative in the Sixth Committee [367] and commented on article 29 as follows:

It has become necessary to comment on the above article, to which the Kenya Government fully subscribes, in view of the observations made by the Somali Democratic Republic, on its specific application, *inter alia*, to the Somali-Kenya boundary.[368]

It is the opinion of the Kenya Government that the International Law Commission took the correct legal position on boundary régimes as reflected in the draft article 29 and the commentary thereon, because the purpose of a boundary treaty is to mark out with precision the limits of a particular State sovereignty. Once this is done, the relevance of the treaty, except for evidentiary purposes, disappears. When succession of a State, i.e. . . . "when the replacement of one State by another in the responsibility for the international relations of territory . . ." takes place, the successor State steps into the shoes of the predecessor State in so far as the State's boundaries are concerned, not because of the boundary treaty, but because of the very existence of the boundaries as a fact, delimiting the predecessor State's sovereignty. It is irrelevant and confusing to bring in the issue of self-determination in such a situation in this context, as the Somali Democratic Republic seeks to do.

When the report of the International Law Commission was discussed by the General Assembly during the adoption of the resolution of the Sixth Committee on the item, the Somali representative, in the explanation of his country's vote, made a statement containing arguments similar to those contained in their note verbale. This prompted a reply from the Permanent Representative of Kenya.[369]

[367] See para. 417 above.

[368] See entry for " Somalia " above.

[369] For the text of the reply, see para. 417 above, second entry for Kenya.

The principle of the respect for the sovereignty and territorial integrity of each State and the inviolability of existing boundaries has been enshrined, not only in the Charter of the United Nations, but also in the Charter of the Organization of African Unity, and the charters of various other regional bodies. In the Organization of African Unity resolution AHG/Res.16(1), the Assembly of Heads of State and Government meeting in the First Ordinary Session in Cairo, restated the pledge of all the member States:

"1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

"2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

This is a pledge by which the Kenya Government will always abide with respect to its neighbours and which it expects all the other States to respect.

Observations and proposals of the Special Rapporteur

419. The history of articles 29 and 30 goes back to "Article 4: Boundaries resulting from treaties" presented by Sir Humphrey Waldock in his first report on succession of States and Governments in respect of treaties.[370] That article dealt with boundaries and, in his commentary, Sir Humphrey Waldock distinguished "localized" treaty stipulations and reserved these for consideration at a later stage in connexion with the different cases of succession.[371] It is worth noting that article 4 presented in the first report was included in the first chapter containing the "General provisions".

420. It is not necessary to trace the subsequent history of boundary régimes and other territorial régimes in the deliberations of the Commission, but it is significant that these are matters that have been under consideration since the earliest stages in 1968. Whatever may be said about the details, the essential principles of articles 29 and 30 represent the considered views of the Commission.

421. From this point of departure it now becomes the task of the Special Rapporteur to analyse the comments of Governments on the two articles and to make suggestions for their alteration so far as this may appear to be necessary in the light of those comments. With this end in view and having regard to the importance and difficulty of the subject matter, the comments have been set out at some length. But, in order to complete the story as it emerged during the debate in the Sixth Committee at the twenty-seventh session of the General Assembly in 1972, it is desirable to add here the remarks on the debate made by the Chairman of the Commission.

422. Speaking on 10 October 1972, he said that articles 29 and 30 had been the subject of the most comments, probably because they touched on the most difficult problems. It appeared that a majority in the Committee recognized the need to include in the draft articles rules relating to boundary régimes and other territorial régimes. He recalled that one representative had observed that a new State did not come into existence out of the void and that its territory was precisely what it inherited and on what it was based. On the other hand, it had been

[370] *Yearbook . . . 1968*, vol. II, p. 92, document A/CN.4/202.

[371] *Ibid.*, p. 93, para. 3 of the commentary.

said that the inheritance of a boundary régime infringed the right to self-determination and the contractual freedom of new States. The Chairman remarked that that argument would have more validity if there were not on the other side of the boundary another State which also enjoyed the same rights and the same freedom. He stressed that articles 29 and 30 were confined strictly to the right of succession. The rule which the Commission had sought to propose was that succession could not be invoked as a means of modifying boundary régimes or other territorial régimes unilaterally. The rule it had laid down did not, however, affect the validity of other reasons that might be invoked to contest such régimes.

423. He continued by saying that article 30 had seemed to raise more problems than article 29. He remarked in particular, as regards agreements relating to military bases, that the intention of the Commission had been to exclude them and pointed out, with reference to agreements governing the use of the waters of an international river, that a new State might be just as likely to be harmed as helped if succession were to be made a ground for the termination of a territorial régime.[372]

424. As has already been noted, the comments of Governments have tended to deal with articles 29 and 30 together. However, the articles do raise different questions and it is apparent that article 30 involves more difficulty than article 29. In these circumstances, the Special Rapporteur will now make general observations on articles 29 and 30 together and will then consider the form and drafting of the articles.

General observations

425. Having regard to the comments of Governments, it is clear that article 29, and to a somewhat lesser extent, article 30, have received a very wide measure of support. The voices of clear-cut opposition have been comparatively few. It is not in every case easy to classify the comments of each delegation or Government as if they amounted to a vote for or against or an abstention. Nevertheless, broadly speaking, and subject to particular remarks in certain cases, it may be said that the following delegations gave general support to the articles. These (in the order in which they spoke) were the delegations of France, Australia, Finland, Greece, Denmark, India, Cuba, Liberia, Ghana, New Zealand, Kenya, Canada, Pakistan, Guyana, Bulgaria and Venezuela (article 29 only). The articles also received support in the written comments of the Governments of Czechoslovakia (by implication), the German Democratic Republic, the Netherlands, Poland, Sweden (by implication), the United Kingdom (by implication) and the United States of America. The support of the Cuban delegation was qualified by a statement that the provisions of article 30 should be clarified so that it would not apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. The support of the Liberian delegation was qualified by a statement that the attainment of sovereignty conferred upon a new State the right to review and change, within the scope allowed by international law, questions affecting its national interests and all treaties including dispositive treaties. The New Zealand delegation raised the question whether the articles should be formulated in terms of the boundary or régime resulting from the dispositive effects of the treaty or with relation to succession in respect of the treaty. The delegation of Kenya said that treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States, but what could be said to survive the succession were rights and interests created by usage.

426. An almost totally negative attitude was expressed by the delegations of Afghanistan and Romania and the delegation of Zambia was opposed to the articles in their present form. The position of the Government of Somalia, as expressed both through its delegation and in writing, may be said to be opposed to the articles and in particular to article 29 having regard to its disputes with Ethiopia and Kenya.

427. Doubts of various kinds were raised by five delegations. The Spanish delegation did not challenge the fundamental considerations on which articles 29 and 30 were based but felt that the Commission should give the problem of territorial régimes more detailed study and elaborate its conclusion. The Egyptian delegation questioned the separate treatment of the rights and obligations arising under a treaty from the treaty which created them and suggested that it would be more appropriate in any event to include the relevant provisions in the draft articles pertaining to State succession in respect of matters other than treaties. The delegation of Nigeria questioned the legal basis for placing territorial treaties in a special category for the purposes of the law applicable to succession of States. The delegation of the United Republic of Tanzania might perhaps be regarded as having supported the draft articles subject to the clarification that the administering authority of a trust territory could not conclude a treaty on behalf of the trust territory so as to bind it in perpetuity. Finally, the Moroccan delegation thought that article 30 should be clarified and that there should be a provision for arbitration if the rules laid down in articles 29 and 30 should conflict with the principle of self-determination or if the treaty was considered to be unequal.

428. It would be fruitless to attempt a full and precise account of the views of Governments that have supported or opposed or expressed doubts on articles 29 and 30. On the other hand, taking a broad view, it clearly emerges from the oral and written comments that a large majority of the Governments that have expressed views are, in principle at least, in favour of these two articles. Nevertheless, it may be helpful to try to summarize the arguments for and against the articles.

429. The central legal considerations in support of the principle underlying articles 29 and 30 are given in the commentary in the report of the Commission.[373] These considerations are reinforced by an examination of State

[372] See *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1328th meeting, para. 18.

[373] Paras. 1-8 of the commentary.

practice with respect to boundary treaties [374] and other territorial treaties.[375] The essence of the case is put succinctly in the beginning of the commentary.[376] It is there observed that, both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as a "territorial", "dispositive", "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States: and that the weight of opinion amongst modern writers supports the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States.

430. In the paragraphs of the commentary that follow, certain cases are mentioned which are at least consistent with the traditional doctrine and which could hardly have been dealt with as they were except on the basis of an underlying principle of continuity. The evidence in support of the traditional doctrine may be indirect but it is strong. The cases mentioned are: the case concerning the *Free Zones of Upper Savoy and the District of Gex* before the Permanent Court of International Justice, the matter of the demilitarization of the Åland Islands considered by the Committee of Jurists, the case concerning the *Temple of Preah Vihear* and the case concerning *Right of Passage over Indian Territory*.[377]

431. The underlying principle of continuity of boundary and territorial rights and obligations may be expressed in different ways. It may be said that a successor State can only acquire such rights as it was within the power of the predecessor State to give and that the territory of the successor State must be subject to such limitations and obligations as adhered to the territory before the succession of States. It may be said that some treaties create real rights and obligations which are valid as against all the world. It may be said that certain territorial rights have the character of servitudes. So far as boundaries are concerned, it may well be said that the successor State cannot inherit a larger territory than fell within the boundaries enjoyed by the predecessor State. A successor State which, for example, emerges to independence by seceding from another State cannot by that act automatically enlarge its boundaries and acquire territory at the expense of a third State.

432. While the point can be more easily expressed with respect to boundaries, the same basic considerations also apply to rights and obligations which, although they do not actually concern the boundary as such, do directly affect the rights that may be enjoyed in respect of a particular territory. If one has regard to the general principles of law, rights and obligations of this kind should not be destroyed merely as a result of a succession of States. Moreover, to allow a succession of States in itself to provide a ground for unilateral rejection of settled boundaries or of territorial rights and obligations would tend towards uncertainty and instability, and would not, generally speaking, be in the interests of the maintenance of international peace and security.

433. Although it is comparatively simple to make provision in this context for boundaries but difficult to define with precision territorial rights and obligations which survive a succession of States, both categories of cases are affected by the main considerations indicated above which militate in favour of the application of the principle of continuity rather than that of the clean slate in these exceptional cases.

434. Various arguments have been made against the inclusion of articles 29 and 30 in the draft. For example, the Nigerian delegation questioned generally the basis in international law which justified placing territorial treaties in a special category for the purposes of the law applicable to succession of States. The delegation of Afghanistan, calling attention to the complexity and controversial character of the articles, suggested that they should be left out. The delegation also said that the topic was not germane to State succession. The Egyptian delegation, on the other hand, suggested that these articles were concerned rather with succession of States in respect of matters other than treaties and should appear in that set of draft articles rather than in the set dealing with succession of States in respect of treaties.

435. Arguments of this kind tend to ignore the underlying principle of the articles considered above and the practical need for some exception to the clean slate principle to deal with boundary and territorial régimes. Otherwise, in the case of every succession of States where the clean slate principle applied, the successor State would have a unilateral right to repudiate existing boundaries and territorial rights and obligations created by treaty. When one views the possibilities from this angle, the need for provisions such as those in articles 29 and 30 is apparent. The disturbance to international relations that might follow from such a right of unilateral repudiation is not one that could be lightly contemplated. It may be that in some cases the doctrine of continuity of boundary and territorial régimes may lead to political tension, as maintained by the delegation of Afghanistan, but this is unlikely in the large majority of cases. Indeed, the disturbance of existing boundaries is much more likely to create chaos than their maintenance.

436. There are, however, certain arguments of principle that have been urged against articles 29 and 30. It has been said that the permanency of boundary and territorial treaties could not be recognized if the treaty was not lawful in the first place. This kind of argument has been presented, for example, by Afghanistan, the United Republic of Tanzania and Somalia. This argument, however, does not really touch the essence of article 29 and 30, which deal with the boundaries or rights and obligations relating to territory and do not purport to continue in existence the relevant treaties. There is nothing in article 29 or article 30 to prevent the original treaty from being attacked on any legal ground that may be available to the successor State under international law.

437. It has also been argued that those articles are contrary to the principle of self-determination (for example by the Romanian delegation) and the principle of the sovereign equality of States (for example by the

[374] Paras. 10-16 of the commentary.

[375] Paras. 20-34 of the commentary.

[376] Paras. 1 and 2.

[377] See paras. 3-8 of the commentary.

delegation of Zambia). At first sight, it may appear that there is some force in these arguments, but when one considers that a dispute of a territorial character will always involve the interests not only of the new State but also of a third State, it is apparent that the principles of self-determination and sovereign equality require respect for the boundaries and territorial rights and obligations of the third State just as much as those of the new State. Indeed, in the case of a newly independent State which has acquired independence by the exercice of self-determination, it may well be said that it can only acquire the territory in respect of which self-determination has been exercised and not part of the territory of a neighbouring State. If the principle of self-determination is to be applied, it should surely be applied equally with respect to the part of the territory of the neighbouring State which is claimed by the newly independent State. In any event, as pointed out by the Government of Poland, one also has to take into account the principle of respect for the territorial integrity of States.

438. Finally, there has been some criticism of the reliance placed by the Commission on article 62, paragraph 2 (*a*), of the Vienna Convention.[378] For example, the Romanian delegation said that it failed to understand how the emergence of a new State resulting from the liberation of a people from colonial domination could be regarded as a fundamental change of circumstances within the meaning of article 62 of the Vienna Convention. On the other hand, the Zambian delegation seemed to take an opposite point of view when it said that a question arose as to whether, in the case of the accession of a State to independence, the change of circumstances was not so fundamental that the exception for which provision was made in article 62, paragraph 2 (*a*), of the Vienna Convention should not be applicable. It may be thought that these two comments tend to cancel each other.

439. Having regard to all the foregoing considerations, the Special Rapporteur is of the opinion that the case for the maintenance of articles 29 and 30 is virtually overwhelming, but their form and drafting may require further consideration.

440. Special care should be taken with the commentary to ensure that the intention is made clear, particularly with respect to the point that the provisions of the articles would leave untouched any other ground for claiming the revision or setting aside of a boundary settlement whether self-determination or the invalidity or termination of the treaty.[379] In this connexion, it may be noted that no special mention has been made above of the disputes which Somalia has with Ethiopia and Kenya. This is not due to oversight but because it is considered that, in accordance with its normal practice, the Commission should do its best to avoid giving the appearance of making decisions which may be regarded as influencing the settlement of a particular dispute one way or the other. Nevertheless, the materials submitted by Somalia, Ethiopia and Kenya have been borne in mind and, if the commentary does not at present accurately reflect the position of the three Governments, special care should be taken to ensure accuracy in the final version of the commentary.

Articles 29 and 30

441. The comments specifically relating to the form and drafting of article 29 are relatively few, and they all also affect article 30. In order to avoid repetition they will be considered here in connexion with both articles. The comments on article 30 will be considered separately below.

442. Probably the most far-reaching comments are those of the Zambian delegation which said that the question of territorial treaties should be re-examined "with a view to the formulation of rules in keeping with current realities and in harmony with widely accepted rules of international law". The delegation considered that the articles drafted by the Commission cut across the principles of self-determination and sovereign equality of States and "belied . . . existing facts". It criticized "colonial frontiers" because they had been drawn up "without any regard for geographic or ethnic considerations", and stressed that the principle, that a State could only be bound by a treaty by giving its consent to be bound, applied in respect of boundary and territorial régimes. The delegation, while not intending that all territorial treaties should be disregarded, also questioned whether the exception to the *rebus sic stantibus* rule stated in article 62, paragraph 2 (*a*), of the Vienna Convention should be applicable in the case of the accession of a State to independence.[380]

443. In the view of the Special Rapporteur, these comments of the Zambian delegation amount to a challenge to the principle on which articles 29 and 30 are based. They have, in effect, been answered in the general observations made above, but have been restated here in case they raise any point of which further account should be taken by the Commission.

444. The Egyptian delegation posed the question how in legal theory the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations. While supporting the approach taken by the Commission in the draft articles, the New Zealand delegation also asked the question: "Whether the rules in articles 29 and 30 should be formulated in terms of the boundary or régime resulting from the dispositive effects of a treaty, or whether they should relate to succession in respect of the treaty".[381] This is a question that was considered by the Commission at its twenty-fourth session in 1972. The decision to draft the articles in terms of the boundary or the obligations and rights established by a treaty may be regarded as a deliberate choice. In the view of the Special Rapporteur, it is a wise choice because in a treaty establishing a boundary, for example, there may be many other provisions, some of a "personal" character, which should be subject to the ordinary rules affecting

[378] See paragraph 17 of the commentary, to articles 29 and 30.

[379] See paras. 16 and 19 of the commentary.

[380] See para. 417 above, entry for "Zambia" and foot-note 340.

[381] *Ibid.*, entry for "New Zealand" and foot-note 334.

succession in respect of treaties and should not form part of the exception merely because they are contained in a treaty which establishes a boundary. Moreover, it also seems as a matter of principle that it is the nature of the effects of the treaty which gives rise to the element of permanence (what are often called the "dispositive" effects) and not the general character of the treaty as such. This is particularly apparent in the case of treaties of peace where the provisions may range over a wide scope, some dealing with boundaries and disposition of territories and others, for example, adjusting financial claims and even providing for ordinary commercial and similar matters. Another advantage of the form adopted by the Commission is that it avoids providing a ground for saying that an unlawful treaty would be perpetuated by the articles. By speaking of the boundaries or the obligations and rights established by a treaty, the way is clearly left open to an attack on the validity of the treaty if there should be grounds for it. Moreover, the majority of the comments appear to have accepted the approach adopted by the Commission. In these circumstances, the Special Rapporteur advises that the form of article 29 (and of article 30) should in this respect be maintained.

445. The Swedish Government has suggested that the negative form of the introductory words "a succession of States shall not as such affect" should be replaced by some wording affirming that the régimes continue in force in regard to successor States. The Spanish delegation also raised some doubt about the negative form of the articles and suggested that they should be the subject of more detailed study in the context of the draft as a whole and in particular article 6.

446. As regards the last remark, articles 29 and 30 in their present form seem to fit well with article 6, which excludes the application of the articles to a so-called succession which may occur unlawfully. There is, however, room for consideration as to whether articles 29 and 30 should be cast in a negative or a positive form. Again the choice of form appears to have been made deliberately by the Commission. It has the advantage of clearly limiting the scope of articles 29 and 30 to a succession of States, within the meaning of article 2, paragraph 1 (*b*), and article 6. The negative form also has the advantage of leaving open the possibility of attack on the treaty itself if there should be good grounds, other than the succession of States itself, for such an attack. For these reasons, the Special Rapporteur does not propose any change in this respect in the form of article 29 or 30.

447. Finally, there is the suggestion of the delegation of Morocco that provision should be made for arbitration if the rules laid down in articles 29 and 30 conflict with the principle of self-determination of the peoples involved or were disputed by a State declaring itself not bound by a treaty considered to be unequal. Reference was made to experience in Latin America and, in a more limited way, in Africa. The delegation commented that it would probably be easier to find an appropriate solution for each particular problem that might arise in the field through arbitration rather than through the rigid framework proposed by the Commission.

448. These comments may be read either as an attack on articles 29 and 30 as such or as a suggestion that, at least in certain circumstances, disputes arising in their application should be subject to arbitration. On the first interpretation, the Special Rapporteur has nothing to add to the general observations made above. The question of arbitration falls for consideration in connexion with the general question of the settlement of disputes to be dealt with subsequently.[382]

Article 30

449. To facilitate the exposition of the points raised, the comments on article 30 will be considered under the following sub-headings:

(*a*) Distinction between articles 29 and 30;
(*b*) Unequal treaties;
(*c*) Simplification and clarification;
(*d*) Extension to analogous cases;
(*e*) Definition of "territory".

(a) *Distinction between articles 29 and 30*

450. The delegation of Kenya commented that article 30 should not be placed on the same footing as article 29 and that the question of other territorial régimes should be dealt with separately. The delegation said that treaties concluded between several colonial Powers, such as the Berlin Act of 1885, could not be regarded as binding on the successor States if they were newly independent States. What could be said to survive the succession were rights and interests created by usage, which could be the subject of new arrangements on the basis of the principle of good-neighbourliness.

451. The exact intent of these comments is difficult to assess. The may be read as suggesting, like those of the Egyptian delegation, that territorial régimes should not be dealt with in articles on succession of States in respect of treaties. If so, there is nothing to add to what has been said above in that connexion. On the other hand, the comments of the delegation of Kenya may be interpreted as meaning that certain kinds of treaties, such as the Berlin Act of 1885, may be open to invalidation, but that the rights and interests which such treaties purported to create have in fact become well founded by usage. If this is the right interpretation, then the rights and interests in question would not, of course, fall within article 30 and, not having been established by treaty, would not properly come within the articles on succession of States in respect of treaties. However, even if there are treaties that may be considered as invalid, there are undoubtedly many treaties establishing territorial régimes which are regarded as valid and the possibility of some treaties being open to attack is not a good reason for failing to make provisions, such as those contemplated in article 30. It may be that it will be necessary, in the draft articles on succession of States in respect of matters other than treaties, to make provision for cases such as those contemplated by the delegation of Kenya. But, so long as article 30 does not exclude the possibility of questioning

[382] See para. 8 and foot-note 10 above.

the validity of treaties on grounds other than the succession of States, the comments of the delegation of Kenya do not seem to raise good grounds for omitting article 30 from the draft.

(b) *Unequal treaties*

452. The Governments of Czechoslovakia and of the German Democratic Republic have suggested that article 30 should be amended so that it should not be used to justify the existence of territorial régimes based on "unequal treaties". They suggest, in effect, that the article should be supplemented by a provision which would limit its application to cases of territorial régimes which serve the interests of international co-operation and are in accordance with the purposes and principles of the Charter of the United Nations.

453. In considering this suggestion, it is necessary to distinguish between the validity of the treaty creating a territorial régime and the nature of the régime itself. So far as the nature of the régime is concerned, the position would seem to be regulated by Article 103 of the Charter, at least in the case of Members of the United Nations. By virtue of that Article, if their obligations under the treaty were in conflict with their obligations under the Charter, the latter would prevail and to that extent the régime would be inoperative. It would not, therefore, seem to be necessary to make any provision in the draft articles providing for cases of conflict between a territorial régime and the Charter of the United Nations. On the other hand, if the validity of the treaty is to be brought into question, this would raise issues concerning the application of the rules of international law relating to treaties, including those contained in the Vienna Convention. Up to the present stage, it has been the consistent view of the Special Rapporteur that the draft articles should deal only with matters relating to the effects of a succession of States and should not attempt to reiterate rules, such as those relating to the validity of treaties. So long as it is absolutely clear that article 30 does not prejudice any grounds that there may be for invalidating or terminating a treaty, there is not, in the view of the Special Rapporteur, any good reason for departing from the general approach adopted in the case of the other articles.

(c) *Simplification and clarification*

454. The delegation of Finland and the United States Government have suggested the simplification of the drafting of article 30. The Finnish comment is general: it would presumably imply combining sub-paragraphs (*a*) and (*b*) in each of the two paragraphs. It might be possible in both paragraphs to deal together with obligations and rights, as in sub-paragraph (*b*) of article 29. This is worth consideration as a matter of drafting but care should be taken not to distort the meaning or to detract from the clarity of the text.

455. The United States Government, however, has made a more specific comment, namely that it is unnecessary and unduly confusing to provide in paragraph 1 that the rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This is a point that calls for careful consideration because one of the criticisms that may be levelled against article 30 is that it does not define with sufficient precision the categories of cases to which it applies, and the relation of the rights and obligations to particular territories is one way of tending to ensure that the article is not too broad in its scope. On the other hand, there may be cases, such as the example of transit rights accorded to a land-locked State mentioned by the United States Government, which might be excluded—perhaps wrongly excluded—by the requirement of attachment to a particular territory. In the view of the Special Rapporteur, the considerations in this respect are fairly evenly balanced and the point should be further considered by the Commission.

456. By contrast with the comments of the United States Government, the Cuban delegation expressed the relief that the scope of article 30 should be clarified because with its present wording it seemed to apply indiscriminately to all the many kinds of territorial treaties, including those concerning the establishment of military bases. It does not appear to have been the intention of the Commission to include such treaties, which may be regarded as conferring a benefit on a foreign State with respect to a particular territory but which is not for the benefit of a particular part of the territory of the foreign State. It may be that some further clarification of article 30 is needed to exclude this kind of case, but it does appear that, if the suggestion of the United States Government were adopted, it would be more difficult to argue that treaties establishing military bases are excluded from article 30 than if the present wording were maintained.

457. The delegation of Morocco made a general comment that the wording of some of the draft articles should be clarified, particularly that of article 30. It is a pity that the delegation did not indicate in what way it considered that the wording of that article might be clarified, but the comment does reflect a trend which is perhaps more implied than expressed in a number of the comments of delegations and Governments. It is difficult to see how the cases to which article 30 applies could be more clearly and specifically defined, yet it is difficult to avoid the feeling that some greater degree of precision is desirable. The Special Rapporteur regrets that at the moment he is unable to offer any more precise draft, but he does suggest that care should be taken not to make the language of either paragraph 1 or paragraph 2 more general than it is in the present draft.

(d) *Extension to analogous cases*

458. The Netherlands Government has suggested that the reasons for providing for the inheritance of territorial arrangements also apply to certain treaties containing rules in respect of the fundamental legal position of the population of the territory in question. Examples given by the Government are: treaties with respect to minorities, the right to opt for a particular nationality and other treaties guaranteeing fundamental rights and freedoms to the population of the territory involved in a succession of States.

459. While the Special Rapporteur recognizes the basic merits of the suggestion made by the Netherlands Government, it seems to him that this suggestion goes well beyond the type of territorial régime to which article 30 relates. It raises again the question whether, apart from territorial régimes, there should be other exceptions to the clean slate principle. The view of the Special Rapporteur already expressed above is that it would not be feasible to make provisions of that kind for special categories of treaties. However, the matter is of considerable importance and is one that is worthy of consideration by the Commission at every stage of its work.

(e) *Definition of "territory"*

460. The United Kingdom Government has suggested that the term "territory" should be defined so as to include "all or any part" of a State's territory. This suggestion is inspired by the commentary, which said that "territory" for the purposes of article 30 was intended to denote "any part of the land, water or air space of a State". The commentary explained that the Commission considered this to be the natural meaning of the word in a context like the present one and that it was unnecessary to specify it in the article.[383]

461. It may be worth recalling that in alternative A and alternative B of article 22 (*bis*) (the predecessor of article 30) submitted to the Commission at its twenty-fourth session, Sir Humphrey Waldock included a definition of the term "territory".[384] On the recommendation of the Drafting Committee the definition was abandoned.[385] The Special Rapporteur does not see any good reason for reconsidering that decision.

Conclusion

462. The conclusion of the Special Rapporteur in the light of the foregoing considerations is that, subject to any possible simplification or clarification of article 30, articles 29 and 30 should be retained substantially in their present form. However, particular care should be taken to ensure the clarity and accuracy of the commentary having regard to the comments of Governments.

PART VI

MISCELLANEOUS PROVISIONS

Article 31. Cases of military occupation, State responsibility and outbreak of hostilities

Comments of Governments

Oral comments

463. *Finland.* The Finnish delegation said that the presence of article 31, which restated article 73 of the Vienna Convention, did not seem absolutely necessary in an instrument that dealt strictly with the succession of States in respect of treaties.[386]

Romania. The delegation of Romania said that there could be no justification for including in the draft a provision relating to cases of military occupation. Under the principles of modern international law prohibiting the use of force in relations between States, situations arising from the use of force, such as military occupation, were, in the delegation's view, illegal and could not lead to the annexation of territories. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations stated that the territory of a State should not be the object of military occupation and that no territorial acquisition resulting from the threat or use of force should be recognized as legal. Accordingly, and in view of the fact that cases of military occupation were not covered by article 73 of the Vienna Convention, the delegation felt that that provision should be deleted from the draft articles. Consideration should also be given to the possibility of deleting the remainder of article 31, in view of the absence of any connexion between its contents and the question of succession of States.[387]

Kenya. The delegation of Kenya said that it could not see the utility of article 6, particularly as the Commission had included in article 31 rules concerning cases of military occupation and outbreak of hostilities.[388]

Union of Soviet Socialist Republics. The delegation of the USSR said that it should be noted that the draft articles applied only to cases of succession occurring in conformity with international law, as stated in article 6, but agreed with the Finnish delegation's view that cases of military occupation, State responsibility and outbreak of hostilities, referred to in article 31 should not affect succession in respect of treaties in force.[389]

Written comments

464. *Czechoslovakia.* The Czechoslovak Government observed that article 31 was based on article 73 of the Vienna Convention and it had no objections of principle to its inclusion. The Government could not agree, however, with the article mentioning "occupation of territory". As a rule, occupation of a territory resulted from the use or threat of force prohibited by current international law. Accordingly, a formulation of the article including the occupation of territory would not be in harmony with the above principle of international law, which was among the most important, not to mention the fact that military occupation had always been regarded as a temporary situation which did not change anything in the international status of the occupied territory. A question arose, therefore, what did occupation have in common with a succession of States? Proceeding from the above arguments, it was recommended that the reference to occupation of territory be deleted from the draft.

[383] Para. 39 of the commentary.

[384] *Yearbook ... 1972*, vol. I, p. 247, 1192nd meeting, para. 71.

[385] *Ibid.*, p. 275, 1197th meeting, para. 7.

[386] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1320th meeting, para. 3.

[387] *Ibid.*, 1323rd meeting, para. 22.

[388] *Ibid.*, 1324th meeting, para. 6.

[389] *Ibid.*, para. 35.

The Government also pointed out that there was no such reference in article 73 of the Vienna Convention.

Poland. The Government of the Polish People's Republic considered that the provisions of the draft articles could be applied solely to cases of State succession which arose while the principles of international law, and in particular the principles enshrined in the Charter of the United Nations, were being respected. The provisions of articles 6 and 31 expressing this proposition dispelled any doubts concerning both the scope of the term "succession of States" and the scope of certain other provisions of the draft. It was useful, therefore, to retain those provisions in their present form.

Observations and proposals of the Special Rapporteur

465. Article 31 has attracted few comments. Such comments as there are relate to the retention or deletion of the article or part of it.

466. The Romanian delegation urged consideration of the possibility of deleting the whole of article 31 because there could be no justification for including a provision relating to military occupation and, as regards the remainder of the article, because it had no connexion with the question of succession of States. The Finnish delegation also said that the article was not absolutely necessary. The delegation of the Soviet Union, while not actually suggesting the deletion of the article, agreed with the Finnish delegation that the factors mentioned in article 31 should not affect succession in respect of treaties in force. On the other hand, the delegation of Kenya and the Governments of Czechoslovakia and Poland have, by implication or expressly, supported the retention of the article. Hence, the comments do not provide any clear-cut view of Governments as to the retention of article 31 except so far as the lack of adverse comment may be regarded as indicating an absence of dissent.

467. Reasons for the inclusion of article 31 are given in the report of the Commission on the work of its twenty-fourth session,[390] and in the commentary. The second and third matters excluded, namely questions arising in regard to a treaty from the international responsibility of a State or from the outbreak of hostilities reflect the exclusions made by article 73 of the Vienna Convention. Since the articles on succession of States in respect of treaties have been drafted within the framework of the Vienna Convention, it could easily give rise to misunderstanding if they did not contain a provision similar to article 73. Of course, it would be otiose in articles on succession of States to include the reference to that matter made in article 73. Otherwise, in order to avoid undesirable implications that might arise from the omission of provisions corresponding to article 73 of the Vienna Convention, it seems to be necessary to include provision as to the second and third matters excluded by article 31.

468. Different considerations apply, however, to the exclusion of questions arising in regard to a treaty "from the military occupation of a territory". The Romanian delegation and the Government of Czechoslovakia have urged the deletion of that provision. On the other hand, it has received general support from the Government of Poland, and particular support by the delegation of Kenya in so far as the latter, in suggesting that there was no utility in article 6, relied on the fact that the Commission had included cases of military occupation and outbreak of hostilities in article 31. The reasons for excluding the mention of "military occupation of a territory" may be summarized as follows. The matter is not mentioned in article 73 of the Vienna Convention on which article 31 is based. Moreover, occupation of territory usually results from the use or threat of force which is prohibited by current international law. Such a situation is accordingly illegal. Finally, military occupation is a temporary situation which does not change anything in the international status of the occupied territory.

469. It is apparent from the commentary,[391] that the Commission was aware of these considerations. "Military occupation" was deliberately added to the cases mentioned in article 73 of the Vienna Convention. The decision was taken after the matter had been considered in the Drafting Committee, as appears from the record of the discussion in the Commission.[392] Of course, in an article that is based on provisions of the Vienna Convention, it is undesirable to add something new unless that is necessary having regard to the requirements of the subject matter of succession of States in respect of treaties.

470. In this connexion, it should be borne in mind that article 31 is itself an exclusion clause. The mere fact that a military occupation may be the result of the illegal use or threat of force is not in itself a conclusive argument for failing to make it clear that the draft articles do not prejudge any question that may arise in regard to a treaty from such occupation. If there is a risk that it might be argued that a military occupation may have factors in common with a succession of States and that the rules relating to succession of States in respect of treaties should apply by analogy, it is safer to provide expressly that such questions are not prejudged by the draft articles. It might more convincingly be argued that article 6, which limits the application of the articles to the effects of a lawful succession of States, may make the provision in article 31 unnecessary. However, as pointed out in the commentary,[393] it is doubtful whether article 6 would be adequate to cover every case of military occupation. In the view of the Special Rapporteur, the very fact that in most cases a military occupation will be unlawful makes it desirable to be quite clear that no questions relating to the effect of such an event on a treaty is intended to be prejudged by the present articles.

471. In the light of these considerations, the Special Rapporteur proposes that article 31 should be retained substantially in its present form.

[390] See *Yearbook ... 1972*, vol. II, pp. 228-229, document A/8710/Rev.1, para. 44 and foot-note 35.

[391] See in particular para. 1 of the commentary.

[392] See *Yearbook ... 1972*, vol. I, p. 267, 1196th meeting, paras. 1-2 (discussion of article X, which later became article 31).

[393] Para. 1 of the commentary.